No. 83-6583

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES KENNETH FOSTER,

Petitioner,

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the right to effective assistance of counsel is vitiated where, in a Florida capital sentencing trial, defense counsel fails to present available evidence of serious mental illness which, as a matter of state law, is the only evidence that can compel the trial judge to find and weigh the statutory mitigating circumstances available to his client?

2. Whether the court of appeals, having properly exercised its discretion to review an issue raised in the district court but not on appeal and having decided the case on the basis of that issue, can thereafter revoke its initial decision to review the issue when the revocation amounts to an abuse of discretion?

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

****

CHARLES KENNETH FOSTER,
Petitioner,

v.

CHARLES G. STRICKLAND, JR., et al.,
Respondents.

****

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, CHARLES KENNETH FOSTER, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed June 27, 1983. Rehearing was denied on December 30, 1983.

CITATION TO OPINION BELOW

The opinion of the court of appeals is reported at 707 F.2d 1339 (11th Cir. 1983), and is set out at pages 1a-15a of the Appendix.[1] The order denying rehearing is set out at App. 17a.

JURISDICTION

The judgment and opinion of the court of appeals were filed on June 27, 1983, and petitioner's timely petition for rehearing was denied on December 30, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[1] Citations to the Appendix accompanying this petition are designated App.____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the sixth amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense;

the eighth amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law....

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. 18a-19a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On August 7, 1975, an indictment was filed in the Circuit Court for the Fourteenth Judicial Circuit of Florida, Bay County, Florida, charging Mr. Foster with the murder and robbery of Julian Franklin Lanier on July 15, 1975. (PX-1: 1-2)[2] On October 3, 1975, following a three-day guilt-innocence trial, Mr. Foster was convicted of first degree murder and robbery. (PX-2: 33-35) On October 4, 1975, following a sentencing hearing, Mr. Foster was sentenced to death on his conviction of murder in the first degree, and to life imprisonment on his conviction of robbery. (PX-2: 44, 46)

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[2] References to portions of the record below will be designated as follows:

(a) Transcript of the trial and hearings in the state trial court, five volumes, entered into evidence in petitioner's habeas corpus hearing, as "PX-___" (1A, 1B, 1C, 1D, or 1E);

(b) Record on appeal of petitioner's conviction and sentence to the Supreme Court of Florida, one volume, entered into evidence in petitioner's habeas corpus hearing, as "PX-2";

(c) Transcript of the hearing in the district court below on June 18-19, 1981, as "H.T."; hearing exhibits as PX-___; and

(d) Orders of the district court and other documents filed in the district court, as "R."

On February 22, 1979, the Supreme Court of Florida affirmed both of Mr. Foster's convictions and sentences, and on May 10, 1979, denied rehearing. Foster v. State, 369 So.2d 928 (Fla. 1979) (App. 20a-24a). The Court denied certiorari on October 1, 1979. Foster v. Florida, 444 U.S. 885 (1979).

Thereafter, Mr. Foster filed a motion for post-conviction relief, pursuant to Rule 3.850, Fla. R. Crim. P., in the trial court. Relief was summarily denied. On appeal to the Supreme Court of Florida, the trial court's order denying post-conviction relief was affirmed. Foster v. State, 400 So.2d 1 (Fla. 1981) (App. 25a - 29a).

Following the exhaustion of his state remedies, Mr. Foster pursued federal collateral remedies. On May 26, 1981 he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida, and on July 2, 1981, judgment was entered denying his petition. Foster v. Strickland, 517 F.Supp. 597 (N.D. Fla. 1981) (App. 30a-41a). Thereafter, Mr. Foster appealed to the United States Court of Appeals for the Eleventh Circuit. On June 27, 1983, a panel of the Eleventh Circuit issued an opinion affirming in part, and reversing in part, the district court's judgment, and remanding for further proceedings. Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983) (App. 1a-15a). The reversal was on the basis of Mr. Foster's claim that the state trial court's inadequate findings in support of the sentence of death deprived him of his constitutionally protected right to meaningful appellate review of the sentencing decision in his case. The court reached this issue, which had been litigated in the district court, despite its not having been raised on appeal.

Thereafter, the respondents petitioned for rehearing and suggested rehearing en banc. On November 3, 1983, the court of appeals entered an order, apparently but not expressly in response to the petition for rehearing, striking that part of the opinion which had granted relief to Mr. Foster:

> Upon further consideration, we conclude that the failure of the appellant to raise the issue concerning "the trial court's findings of fact in support of its sentence" in its brief or in oral argument before us forecloses our consideration of the issue sua

sponte. Cf. Stephens v. Zant, 716 F.2d 276 (5th Cir. 1983), on remand from the Supreme Court of the United States.

That part of our opinion in this case beginning with VI and through the conclusion, together with the dissenting opinion, are hereby stricken and the following is substituted in lieu thereof:

THE JUDGMENT OF THE TRIAL COURT DENYING THE WRIT IS AFFIRMED.

(App. 16a).[3] Mr. Foster thereafter filed a petition for rehearing and a motion to reconsider the sua sponte reversal, and both applications were denied on December 30, 1983 (App. 17a).

B. Material Facts

Some time after 7:00 P.M. on July 14, 1975, Mr. Foster went to a bar in Panama City, Florida to drink and socialize. (PX-1C: 341-342) During the course of the evening, Mr. Foster met an older man, Julian Franklin Lanier, and the two of them spent much of the rest of the evening drinking and visiting. (PX-1D: 471-472) Toward midnight, at Mr. Lanier's insistence, Mr. Foster arranged to "party" with two women -- Gail Evans and Anita Rogers -- and the two women, along with Mr. Lanier and Mr. Foster, drove out into a rural section of Bay County in Mr. Lanier's camper. (PX-1D: 423-425)

Some time after Mr. Foster and Mr. Lanier joined Ms. Rogers and Ms. Evans, Ms. Rogers testified that Mr. Foster said to her that he was going to "rip the old man off" when Mr. Lanier had sex with Ms. Evans. (PX-1C: 256) Also during this period of time, Mr. Foster asked Ms. Rogers to trade rings with him. (PX-1C: 265-266) Mr. Foster's ring was a steel ring with a "K" on it, and Ms. Rogers' ring was a school class ring. (PX-1C: 265-266)

En route to the rural section of Bay County, Mr. Lanier, who had been driving his camper, asked Gail Evans to take over, because he was too intoxicated to drive further. (PX-1D: 424-425) During this same time, Mr. Foster was with Ms. Rogers in a

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[3] Because of this order, the opinion as now reported in Federal Reporter, 2d Series has had part VI removed. Because one of Mr. Foster's claims concerns the court of appeals' handling of this issue, however, the copy of the opinion as it was issued on June 27, 1983 and subsequently printed in the Federal Reporter Advance Sheet is the copy included in the Appendix (App. 1a-15a).

bed in the rear of the vehicle. (PX-1D: 472) Upon stopping the camper in the area where they planned to go, Gail Evans began talking about having sex with Mr. Lanier. (PX-1D: 426) Mr. Lanier took his clothes off, and persuaded Gail Evans to remove her pants and have sex with him. (Id.)

At the very moment that this happened, Mr. Foster jumped up out of the bed with Ms. Rogers and screamed the following to Mr. Lanier: "You stupid mother fucker, are you going to try and fuck my sister." (Id.) Immediately thereafter, Mr. Foster began striking Mr. Lanier in the face. (PX-1C: 257-258) After he had hit Mr. Lanier several times, Mr. Foster sat back down, pulled out a knife, and for no apparent reason, held the knife to Mr. Lanier's throat and cut him. (PX-1D: 473) Thereafter, Mr. Foster knocked Mr. Lanier on to the floor of the vehicle and told the two women to drag him out by his hair. (PX-1C: 260) At about the same time, Mr. Foster grabbed Mr. Lanier by his penis, at which point Mr. Lanier "jumped up," and Mr. Foster hit him again. (Id.) Thereafter, the two women and Mr. Foster dragged Mr. Lanier from the camper into some nearby bushes where they laid him face down and covered him with some pine branches and leaves. (PX-1D: 428-429) Ms. Rogers testifed that, at this point, the three of them could still hear air coming out of Mr. Lanier, and at that point, Mr. Foster cut Mr. Lanier's spine at the base of his neck. (PX-1C: 261-262)

Following these events, Mr. Foster, Ms. Rogers, and Ms. Evans returned to the camper, and the three of them decided to go to the beach area of Panama City. (PX-1C: 262-263) On their way back to the beach, Ms. Rogers found Mr. Lanier's wallet, and the money remaining in the wallet was then divided among the three of them. (Id.) Upon arriving at the beach, Mr. Foster, Ms. Rogers, and Ms. Evans abandoned the camper in the parking lot of a motel (PX-1C: 264). Thereafter, they parted ways, at approximately 2:00 A.M. on July 15, 1975. (PX-1C: 373).

At approximately 9:00 A.M. on July 15, 1975, Anita Rogers and Gail Evans went to the Bay County Sheriff's Office and gave statements to the authorities concerning what had happened. (PX-1C: 242-243) At approximately noon, Mr. Foster turned himself

over to the authorities and was charged with the murder and robbery of Julian Lanier. (PX-1D: 475)

On July 20, 1975, at approximately 4:00 A.M., Mr. Foster asked to talk with the authorities at the Bay County Sheriff's Office. (PX-1D: 464) Within the next two hours, a statement was taken from Mr. Foster in which he recounted the events leading up to Mr. Lanier's death and confessed that he had killed Mr. Lanier (PX-1D: 463-484) However, he insisted that he had not robbed Mr. Lanier, and he insisted that he did not know why he killed Mr. Lanier. (PX-1D: 483)

Mr. Foster was represented at trial by Virgil Mayo, the public defender for the Fourteenth Judicial Circuit. (H.T. 12) Upon taking over Mr. Foster's case from an assistant public defender prior to trial, Mr. Mayo attempted to develop a defense strategy with Mr. Foster. (H.T. 18) Prior to Mr. Mayo's entry into the case, the only strategy which had been developed was to request a pre-trial psychiatric evaluation of Mr. Foster's competency to stand trial and sanity at the time of the offense. (H.T. 18) Mr. Foster's former counsel from the public defender's office had filed such a motion, and it had already been granted by the trial court. (H.T. 18; PX-14)[4] Following his initial investigation into Mr. Foster's case and his examination of Mr. Foster's mental health records, Mr. Mayo made a "strong recommendation" that Mr. Foster allow him to develop a second-degree murder defense. (H.T. 27-28) This recommendation was based upon there being "several very incriminating aspects," to Mr. Foster's case, but also on the "past history and mental condition" of Mr. Foster. (H.T. 27) Through these elements, Mr. Mayo thought that he could develop a second-degree murder defense, showing that Mr. Foster's acts "met the classical conditions of events in a depraved mind." (H.T. 28, 30-31)

Despite extensive efforts by Mr. Mayo to convince Mr. Foster to proceed with such a defense theory, Mr. Mayo was markedly unsuccessful, for Mr. Foster refused to cooperate with any

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[4] Pursuant to the trial court's order, three psychiatrists evaluated Mr. Foster and all three found him competent and sane (PX-14).

defense that would result in some type of incarceration. (H.T. 31) Through his conferences with Mr. Foster, Mr. Mayo felt strongly that Mr. Foster's uncooperativeness was but a symptom of a deeper problem seriously drawing into question Mr. Foster's competency to stand trial, for he also found Mr. Foster unable to appreciate the evidence against him (including the devastating effect of his own pre-trial confession), unable to appreciate the seriousness of his circumstances, and unable to behave rationally, behaving instead as a "paranoid schizophrenic." (H.T. 31-32, 41-42)[5] Finally, however, despite his strong doubts about Mr. Foster's competency, Mr. Mayo gave in to what he believed to be Mr. Foster's irrational position, and agreed to present a defense in which the blame for the murder of Mr. Lanier was cast upon the two women who were with Mr. Foster and Mr. Lanier that night. (H.T. 28-29, 31-32)

On October 1, 1975, Mr. Mayo proceeded to trial on behalf of Mr. Foster utilizing this strategy. (H.T. 28) Upon taking the stand in his own behalf, Mr. Foster testified consistently with the sequence of events related by the State's witnesses up to the point at which Mr. Lanier and Ms. Evans were about to have sex with each other. (PX-1D: 505-510) Mr. Foster then testified that at that point on the night of the homicide, he began having "electric" feelings in his head, an indication that he was about to have an epileptic seizure, and before he could do anything else, he passed out. (PX-1D: 510) At this juncture in his testimony, Mr. Foster indicated that he thought Anita Rogers had killed Mr. Lanier, when suddenly his testimony broke down. He testified as follows:

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5 Mr. Mayo's view of Mr. Foster as a paranoid schizophrenic was clearly substantiated by Mr. Foster's extensive medical/psychiatric history. For a nearly twenty year period prior to the time of the homicide herein, Mr. Foster suffered from severe mental and emotional illness. (PX-7, PX-8, PX-9) Frequently throughout this period Mr. Foster was diagnosed as schizophrenic, as suffering from a "psychotic organic brain syndrome," as one who "becomes psychotic" when he uses alcohol or barbiturates, and as suffering from a permanent form of paranoid schizophrenia. (Id.) Although he never confirmed at the habeas corpus hearing that he had actually obtained copies of Mr. Foster's medical/psychiatric records, Mr. Mayo repeatedly indicated that he had "seen" those records which documented the substantial, severe history of mental illness. (H.T. 22, 24, 88-89)

> I believe that she is the one that killed that man because--fuck it--I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it [indicating to his attorney] but I killed him.

(PX-1D: 510-511) Immediately thereafter, Mr. Foster's testimony concluded, and Mr. Mayo moved for a continuance to allow further psychiatric evaluation of Mr. Foster's competency, but the motion was denied. (PX-1D: 512-513, 516)

Following his witness-stand confession, the jury found Mr. Foster guilty of murder in the first-degree and robbery, and the sentencing phase of Mr. Foster's capital trial commenced. In this phase of the trial, Mr. Mayo believed that the only thing he had to work with was "Kenny's incompetency." (H.T. 63) In order to present Mr. Foster's mental condition as a mitigating circumstance, Mr. Mayo chose to present the testimony of one primary witness, Mr. Foster's former wife. The purpose of this witness' testimony was to reveal Mr. Foster's mental problems and to "get sympathy from the jury." (H.T. 63) In addition to this witness, Mr. Mayo presented very brief testimony by one of the psychiatrists who had evaluated Mr. Foster prior to trial and who had also treated Mr. Foster in previous years, Dr. John P. Mason. However, Mr. Mayo did not intend to have Dr. Mason testify in any detail about Mr. Foster's mental health problems; rather, he sought only to show that Mr. Foster had received psychiatric treatment on several occasions simply to corroborate and substantiate the testimony of Mr. Foster's former wife. (H.T. 64-71) Thus, Dr. Mason's testimony revealed very little about the extensive psychiatric history of Mr. Foster and more importantly revealed nothing about the effects of Mr. Foster's psychiatric illness on his criminal responsibility. (PX-1E: 616-617) Most importantly, the jury also failed to learn that Dr. Mason had made the following findings in connection with the pre-trial evaluation of Mr. Foster:

> At the time of the alleged offense, Mr. Foster freely admits that he has [sic] been drinking, and it is highly probable that his ability to discriminate between right and wrong, or to adhere to the right is significantly impaired by alcohol.

(PX-4B)[6] Mr. Mayo presented no other testimony or evidence in mitigation of the sentence at this phase of Mr. Foster's trial.

Following a brief period of deliberation, the jury returned a verdict recommending that Mr. Foster be sentenced to death. (PX-2: 43) The trial court accepted the jury's recommendation and sentenced Mr. Foster to death. (PX-2: 44) In support of the sentence of death, the court entered the following findings:

> The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in Subsection (5) of Section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravating circumstances. The aggravating circumstances found by the Court are as follows:
>
> 1. The murder of JULIAN FRANKLIN LANIER was committed while the Defendant was engaged in the commission of a robbery.
>
> 2. That the capital felony was especially heinous and atrocious.

C. How the Federal Questions were Raised and Decided Below

Mr. Foster first raised the claim that his trial counsel was ineffective, for failing to present available evidence in the sentencing trial of Mr. Foster's long-standing psychosis and of the impact of this illness on his behavior at the time of the offense, in state post-conviction proceedings. Motion for Post-Conviction Relief (May 12, 1981), ¶¶26(a)(i), (ii), (iii) and (vi). On appeal, the Florida Supreme Court rejected the claim because counsel's decision to present certain evidence and not other evidence was a "matter of judgment ... [for which] ... we cannot fault the attorney ...." Foster v. State, 400 So.2d at 4 (App. 28a).

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[6] Mr. Mayo admitted that he had never talked to Dr. Mason except in the few minutes just before he put him on the stand at trial. (H.T. 64)

The ineffective assistance claim was alleged in identical fashion in the federal habeas petition. Petition for a Writ of Habeas Corpus by a Person in State Custody (filed May 26, 1981), ¶¶26(a)(i), (ii), (iii), and (vi) [R. 22-27, 29-30]. The district court denied relief as to this claim, holding that "[i]n light of the law, or lack of it, and the evidence available, Mayo's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and a good old-fashioned appeal to mercy was reasonable." Foster v. Strickland, 517 F.Supp. at 605 (App. 38a). The court of appeals affirmed, since in its view, "Mayo's choice to present mitigating evidence in the manner he did was a strategic decision informed by years of criminal practice in the region." Foster v. Strickland, 707 F.2d at 1344 (App. 6a).

Mr. Foster first presented the substantive claim underlying the second question presented herein,[7] in his direct appeal. In challenging the trial court's apparent failure to consider mitigating circumstances, Mr. Foster construed the trial judge's inscrutable findings in support of the death sentence as evidence that the judge had failed to consider mitigating circumstances. Brief of Appellant (Florida Supreme Court, No. 48,380), at 22-26. The Florida Supreme Court construed the judge's findings as sufficiently indicating that the judge had considered mitigating circumstances and held that his findings were adequate: "Although the findings of the trial judge in the case sub judice were not expansive, the justification of his sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment." Foster v. State, 369 So.2d at 931-932 (App. 23a-24a).

In order to provide the Florida courts an opportunity to reconsider this issue, Mr. Foster raised it again in post-conviction proceedings in the trial court. Motion for Post-Conviction Relief (May 12, 1981), ¶40. On appeal, the Florida Supreme Court

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[7] The substantive claim itself is not being presented. Rather the court of appeals on-again-off-again, arbitrary treatment of this claim -- in which the court granted relief and then decided that it should not have reached the claim and reversed itself, without providing any opportunity for argument by Mr. Foster before doing so -- is the question presented. See "Reasons ... II," infra.

held that this claim was among those issues "which were raised on direct appeal, or could have been raised on direct appeal," and thus was not appropriate for consideration in post-conviction proceedings. Foster v. State, 400 So.2d at 4 (App. 28a).[8]

The issue was framed in precisely the same fashion in Mr. Foster's federal habeas petition. Petition for a Writ of Habeas Corpus ..., ¶40 [R. 46-47]. The district court held in the alternative, that Proffitt v. Florida, 428 U.S. 242 (1976), had approved the sentencing procedure in Florida and the judge's findings complied with that procedure, or that Wainwright v. Sykes, 433 U.S. 72 (1977) barred review of the claim. Foster v. Strickland, 517 F.Supp. at 607 (App. 40a). While Mr. Foster did not assert this claim on appeal, the court of appeals nonetheless reviewed the claim, in the exercise of its inherent power to review the entire case as presented to the lower court.[9] The court ruled in Mr. Foster's favor, holding that

> [w]hen, as here, there is substantial evidence on the record that would have allowed the trial judge to impose a life sentence, and it is unclear whether the judge ever considered this evidence in reaching his conclusion, we find a substantial "risk that the death penalty . . . [was] imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S. at 605.

Foster v. Strickland, 707 F.2d at 1351 (App. 13a). Thereafter, however, the court summarily reversed itself upon finding that the failure of Mr. Foster to raise this issue on appeal "forecloses our consideration of the issue sua sponte." (App. 16a).

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[8] The court did not specify into which category this issue fell, but it obviously fell into the category of "were raised on direct appeal." See Foster v. State, 369 So.2d at 931-932 (App. 23a-24a), supra.

[9] See Langnes v. Green, 282 U.S. 531, 536-38 (1931).

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VITIATED WHERE, IN A FLORIDA CAPITAL SENTENCING TRIAL, DEFENSE COUNSEL FAILS TO PRESENT EVIDENCE WHICH, AS A MATTER OF STATE LAW, IS THE ONLY EVIDENCE THAT CAN COMPEL THE TRIAL JUDGE TO FIND AND WEIGH THE STATUTORY MITIGATING CIRCUMSTANCES AVAILABLE TO HIS CLIENT.

Similar to Strickland v. Washington, 463 U.S. ___ (1983), now pending decision by this Court, this case involves critical questions concerning the effective representation of defendants in capital sentencing proceedings. Unlike Strickland, however, this case does not focus upon the parameters of counsel's duty to investigate or upon the degree of prejudice which must be shown for a capital petitioner to prevail upon a claim that counsel failed to provide effective assistance. Instead this case focuses upon counsel's presentation of certain evidence at the sentencing trial and omission of other evidence -- all of which was investigated by and thus known to counsel.

At first blush, it may seem that the focus of this case is not worthy of the Court's consideration. Indeed, the presentation of evidence at trial has traditionally been regarded as "trial strategy," which is usually a synonym for "unchallengeable." But the lower courts have recognized that even such decisions as this must be subject to challenge, at least "if the choice [of which evidence to present] was so patently unreasonable that no competent attorney would have made it." Washington v. Strickland, 693 F.2d 1243, 1254 (5th Cir. 1982) (en banc). It is precisely such a choice which Mr. Foster urges the Court to review in his case.

The choice by defense counsel which is at issue was his choice not to present evidence at Mr. Foster's sentencing trial that he suffered from psychosis at the time of the homicide with which he was charged and that he had suffered from psychosis for many years before the homicide, but to present instead, evidence that for several years preceding the homicide Mr. Foster was suicidal, self-mutilative, alcohol dependent, and paranoid and that he had been treated -- at least twice voluntarily -- for these conditions. This choice was made in full recognition by

counsel, Virgil Mayo, that the only statutory mitigating circumstances potential available to Mr. Foster were the "mental" mitigating circumstances set forth in the Florida death penalty statute.[10] Moreover, this choice was made in a state law context in which mental mitigating circumstances had to be found and weighed only in cases in which there was overwhelming evidence of psychosis or disorders of similar quality (which, by definition, substantially impaired appreciation of criminality or ability to control unlawful behavior) at the time of the homicide.

Three reasons compel the grant of certiorari to review this aspect of the representation provided Mr. Foster.

First, the tendency of the courts to defer to decisions of trial strategy, particularly those concerned with the presentation of evidence, unless such decisions are "patently unreasonable," creates a genuine risk in capital cases of unreliable imposition of the death penalty. The analysis of ineffective assistance of counsel claims such as Mr. Foster's reveals why. While the lower courts have consistently rejected pleas for "a special set of rules regarding ineffective assistance of counsel [in] capital cases," Washington v. Strickland, 693 F.2d 1243, 1250 n.12 (5th Cir. 1982) (Unit B) (en banc), cert. granted, 463 U.S.___ (1983); see also Gray v. Lucas, 677 F.2d 1086, 1092 (5th Cir. 1982), cert. denied, ___U.S.___, 103 S. Ct. 1886 (1983); Washington v. Watkins, 655 F.2d 1346, 1356-57 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), the general inquiry in all cases involving claims of ineffective assistance of counsel -- "whether counsel rendered reasonably effective assistance given the totality of the circumstances," Washington v. Strickland, at 1250 n. 12 -- is sufficient to require a different treatment of trial strategy decisions in capital cases. As the courts of appeals have recognized, "[t]he degree of punishment is...one of the totality of circumstances," ibid., to be considered in assessing counsel's effectiveness. Because of this, the concern for

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[10] These were: "[the] capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," Fla. Stat. §921.141(6)(b), and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired," Fla. Stat. §921.141(6)(f).

reliability that is unique to death cases, Woodson v. North Carolina, 428 U.S. 280, 305 (1976), is a "circumstance" which must be taken into account in the analysis of the effectiveness of counsel in a capital case. In relation to the sentencer's consideration of mitigating circumstances, the concern for reliability requires that there be no factors which curtail the consideration of mitigating circumstances, because such factors "create[] the risk that the death penalty will be imposed in spite of [circumstances] which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Certainly trial counsel's strategy decision to present some evidence but not other evidence in support of mitigating circumstances can be such a curtailing factor, for it can have the effect of curtailing the sentencer's consideration of mitigating circumstances if that decision, because of the withholding of evidence occasioned thereby, permits the sentencer not to "find" a mitigating circumstance or to give a "found" mitigating circumstance less weight. Thus, trial strategy decisions in death cases, insofar as they relate to the selective presentation of mitigating evidence, cannot be given the same degree of deference they are given in non-capital cases. Because Mr. Foster's case provides so clear an example of how such strategy decisions can create a "risk that is unacceptable and incompatible with the commands of the eighth and fourteenth amendments," ibid., certiorari should be granted in his case in order to explain the need to give "stricter scrutiny" to such strategy decisions in death cases.

Second, the need for defense counsel to be attentive to state law requirements for the proof of mitigating circumstances in capital sentencing proceedings must be addressed as a critical eighth, as well as fourteenth, amendment issue, for the reasons just articulated: if unaware of state law requirements for the proof of mitigating circumstances, counsel may decide not to present evidence which is necessary to require the sentencer to find and give weight to mitigating circumstances. In addition to being ineffective, such decisions by counsel will create a substantial risk that the eighth amendment decisions of the Court have tenaciously tried to avoid: the risk that death will be

imposed in disregard of mitigating factors. Thus, review of Mr. Foster's case is needed in order to close a critical gap that now exists in eighth amendment jurisprudence. As it now stands, the eighth amendment forbids only the exclusion of mitigating evidence from consideration in the sentencing proceeding. Lockett v. Ohio, supra; Eddings v. Oklahoma, 455 U.S. 104 (1982). Eighth amendment jurisprudence leaves to state law to "determine the weight to be given relevant mitigating evidence." Eddings, at 115; Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3430 n. 2 (1983) (Stevens, J., joined by Powell, J., concurring). Between these two points, the only federal guarantee to a capital defendant that the mitigating evidence which has been admitted into evidence and not excluded from consideration as a matter of law, Lockett; Eddings, will actually be taken into consideration and given weight because it is factually sufficient under state law, is the effective assistance of counsel. If counsel does not know what he has to prove in order to establish (factually) a mitigating circumtance, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605 will persist -- simply because such factors have not been sufficiently proven at trial, despite the availability of sufficient evidence outside the trial record. Thus, the review of Mr. Foster's case and the holding that Mr. Mayo was ineffective would substantially close the gap between the promise of the eighth amendment, that death will not be imposed in a proceeding in which there is a "risk that...[it]...will be imposed in spite of factors which may call for a less severe penalty," id., and the reality of death penalty trials, in which there is just such a risk because available mitigating facts have not been sufficiently adduced to be given weight in the balancing process that leads to a sentence determination.

Third, because the "mental" mitigating circumstances are so frequently relied on by capital defendants as the primary defense against death,[11] the need for effective assistance of counsel in presenting the evidence in support of this circumstance is widespread. Moreover, precisely because this circumstance is so often relied on, the risk of unreliable imposition of death sentences -- because the available evidence is not appropriately introduced -- is equally widespread. The grant of certiorari in Mr. Foster's case, to address the effective evidentiary presentation of mental mitigating circumstances will thus necessarily have an important constitutionally remedial impact upon the administration of capital sentencing procedures in many cases beyond Mr. Foster's.

Having articulated why certiorari should be granted to review the issue presented by his case, Mr. Foster will now turn to a more detailed examination of the issue in the context of his case.

A. The Opinion of the Eleventh Circuit Panel

Mr. Foster argued on his appeal to the eleventh circuit that he was deprived of the effective assistance of counsel at his capital sentencing trial because of counsel's failure to present evidence of his long-diagnosed history of psychosis, and of his lessened ability at the time of the homicide, as a result of this illness, to distinguish between right and wrong. Due to counsel's failure to present such evidence, Mr. Foster argued, "the jury and the judge did not have before them crucial evidence supporting several mitigating circumstances." Foster v. Strickland, 707 F.2d at 1344 (footnote, omitted, referring to the two "mental" mitigating circumstances, Fla. Stat. §§921.141(6)(b), (f), as those circumstances) (App. 6a).

The court resolved Mr. Foster's claim by holding that counsel was effective, despite his failure to tender evidence that Mr. Foster suffered from psychosis at the time of the homicide and that the psychosis impaired his ability to distinguish right from wrong. Despite the simplicity and clarity of this holding,

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[11] E.g., Eddings, 455 U.S. at 115 ("[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation").

however, the process by which the panel reached the holding needs some explanation, for the holding appears to be different from this on the face of the opinion.

On the face of the opinion, it appears that the court of appeals held that Mr. Foster's claim of ineffective assistance was resolved against him because it was not supported by the record:

> The evidence Mayo in fact presented covered essentially the same subjects as that which petitioner would now have him present.

707 F.2d at 1344 (App. 6a). The court thereafter detailed its understanding of what "evidence Mayo [had] in fact presented," as follows:

> Petitioner adduced substantial evidence of his long history of psychiatric illness, including episodic psychosis and paranoid schizophrenia, drug and alcohol abuse and dependence, self-mutilation, and a lessened ability to perceive right from wrong.

707 F.2d at 1349 n. 12 (App. 11a). This evidence, the court found, was presented through the following testimony and documents:

> Mayo put Foster's ex-wife and Dr. Mason, the psychiatrist, on the stand during the sentencing phase. Foster's ex-wife testified to Foster's disturbed emotional state and Dr. Mason bolstered her testimony with medical corroboration of Foster's illness. Also, Mayo introduced certain medical records into evidence, so that the jury had, during its deliberations, written evidence of Foster's emotional health. In addition, the judge should have considered the pre-trial competency reports as part of the material adduced to support the existence of mitigating factors.

707 F.2d at 1344 (footnote omitted) (App. 6a). On the basis of this analysis, therefore, the court -- on the face of its opinion -- concluded that the evidence of psychosis and its impact on Mr. Foster's criminal responsibility had been sufficiently adduced, and that Mr. Foster's argument merely quarreled with form rather than substance. "Mayo's choice to present mitigating evidence in the manner he did was a strategic decision...," ibid. (emphasis supplied), that was not ineffective.

If the court of appeals' reading of the trial record had been accurate, its facial holding would have been correct. However, the court grossly misread and confused the trial record

and the federal habeas record, and as a result reached a facial holding that was flatly contradicted by the record. In a petition for rehearing (included in the Appendix hereto, at 42a-58a), Mr. Foster demonstrated this to the court. First, he showed that the trial record -- of evidence presented before the advisory jury -- contained absolutely no reference to Mr. Foster's diagnosis and history of psychosis or to the impact of that condition upon his criminal responsibility at the time of the homicide. See I(B), infra, pages 19-21. Thus, he demonstrated that the court of appeals' finding that Mr. Mayo had "adduced substantial evidence of his long history of psychiatric illness, including episodic psychosis and paranoid schizophrenia...and a lessened ability to perceive right from wrong," 707 F.2d at 1349 n.12 (App. 11a),[12] was flatly and unquestionably wrong. Second, he showed that only when the trial record was supplemented with the "pre-trial competency reports," ibid., which only the judge had,[13] was there even a sketchy, inconclusive history of mental disorders, occasionally diagnosed as psychotic, and only then was there evidence that Mr. Foster's ability to discriminate between right and wrong was probably impaired by psychosis at the time of the homicide. See I(C), infra, pages 22-24. Thus, he demonstrated that even the record before the trial judge alone did not support the court's finding that Mr. Mayo had "adduced substantial evidence of his long history of psychiatric illness, including episodic psychosis and paranoid schizophrenia...." 707 F.2d at 1349 n. 12 (emphasis supplied) (App. 11a). Finally in his petition for rehearing, he showed that the only "substantial evidence" of Mr. Foster's "long history" of psychosis was to be found exclusively in Mr. Foster's medical records, which were introduced for the first time into any judicial proceeding in the habeas corpus hearing in the federal district court. See I(D), infra, pages 24-25.

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[12] Mr. Mayo did adduce evidence of, and only evidence of, "drug and alcohol abuse and dependence [and] self-mutilation...." Ibid.

[13] These reports (included in the Appendix hereto, at 59a-65a) were never introduced into evidence or even mentioned by counsel or the court in the sentencing procedure. Thus the jury had absolutely no knowledge of the reports.

In light of the court's substantial misunderstanding of the evidence that had been presented to Mr. Foster's trial jury and trial judge, Mr. Foster asked the panel to rehear his case and to find, as an accurate reading of the record required, that Mr. Mayo had failed to present the critical psychiatric evidence that the panel mistakenly found he had presented. App. 45a-56a. The panel, however, summarily denied his request for rehearing. App. 17a. While the panel did not explain its order, because the panel's misunderstanding of the trial record was so egregious and so indisputable, see I(B), (C), and (D), infra, the order must therefore be taken as a holding that counsel was effective despite his failure to tender evidence (as the record conclusively demonstrates, infra) that Mr. Foster suffered from psychosis at the time of the homicide and that the psychosis impaired his ability to distinguish right from wrong.

B. The Evidence Presented to the Jury in Mr. Foster's Sentencing Trial

The evidence presented to the jury in Mr. Foster's sentencing trial consisted entirely of the following: (a) the testimony of two witnesses, Mr. Foster's former wife, Frances Foster, and Dr. John Mason; and (b) two composite documents identified by Dr. Mason. Ms. Foster testified about "abnormalities in [Mr. Foster's] behavior" which she described as the following:

> Well, he cut himself all the time and he has cut all the arteries in his arms and he has cut the heel strain in two and he has burnt steel wool on his leg. Just all kinds of things. The only reasons he doesn't kill hisself [sic] is because he thinks that that is the one crime that he cannot be forgiven for.

(PX-1E: 623). Although Ms. Foster thereafter made an impassioned plea not to kill Mr. Foster because he was a "very sick person" (PX-1E: 625-626), she provided no more details of his sickness.

Dr. Mason testified that he was a psychiatrist and had seen Mr. Foster on "at least four" occasions, two of which were "in the hospital setting" (PX-1E: 615-616). He then was asked to identify the documents pertaining to two involuntary commitment proceedings against Mr. Foster and was asked simply to read from these papers what his diagnosis had been on each occasion. He responded that on November 25, 1970 (defendant's exhibit one),

his diagnosis was "paranoid reaction" (PX-1E: 616), and on February 21, 1974 (defendant's exhibit two), his diagnosis was "suicidal depression with overdose of medication and self mutalative [sic] behavior" (PX-1E: 617). Dr. Mason's testimony concluded[14] with a series of questions which began with his observation that he had examined Mr. Foster and "ma[de] a report to the Court" subsequent to the homicide herein. He was then asked to assume that Mr. Foster had consumed "four or more beers" on the day of the homicide, and on this basis was asked if he could provide his "opinion as to how long Kenny Foster could retain a premeditation for one thought" (PX-1E: 617). Dr. Mason responded,

> Not when the question is phrased quite that way. Certainly I would feel that from past experience Mr. Foster has very poor control when intoxicated and certainly intoxication would effect [sic] his ability to maintain a thought or to maintain a plan or carry it through. But as to estimate exactly how long he would be able to do so I don't think I could really do that.

(PX-1E: 617-618).

The involuntary commitment documents identified by Dr. Mason, which were also admitted into evidence (PX-1E: 614), provided no more insight into the nature or legal consequences of Mr. Foster's illness than did Dr. Mason's testimony. The documents reflecting the involuntary commitment on November 25, 1970 (defendant's exhibit one, a copy of which is included in the Appendix hereto, at 66a-78a) show only that Mr. Foster was deemed to be "incompetent by reason of paranoid reaction; ... that his incompetency is acute ... [and] chronic...[and] that his propensities are delusional thinking...." App. 74a, 75a. And while a "paranoid reaction with delusional thinking" probably described Mr. Foster's psychosis in 1970, there was no testimony presented -- despite Dr. Mason's presence on the witness stand -- to say this, to explain this in any way, or to relate Mr. Foster's condition in 1970 to his homicide in 1975 or to his history of psychosis before and subsequent to this diagnosis.[15]

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[14] No additional insight into Mr. Foster's mental state was elicited on cross-examination or redirect examination (PX-1E: 619-621).

[15] Dr. Mason was asked only to read his diagnosis from this exhibit, which he did, reading only "paranoid reaction" (PX-1E: 616). Dr.

Similarly, the documents reflecting the involuntary commitment on February 21, 1974 (defendant's exhibit two, a copy of which is included in the Appendix hereto, at 79a-87a) show only that the two psychiatrists who evaluated Mr. Foster both found that he was "mentally ill." At that time Mr. Foster was diagnosed as suffering from

> suicidal depression...evidenced by: overdose of medication [and] self-mutilative behavior ...[,]

App. 79a (Dr. John Mason's diagnosis), and

> depressive reaction...evidenced by: near-lethal suicide attempt; drug abuse; self-mutilation; [and] hostile, combative behavior ...[,]

Ibid. (Dr. John Sapoznikoff's diagnosis). As with defendant's exhibit one, only Dr. Mason's diagnosis was read (by Dr. Mason) and no further testimony was elicited concerning the disorders noted here and how they fit into Mr. Foster's pattern of mental illness.

The foregoing represents every shred of evidence adduced in Mr. Foster's sentencing trial in support of mental mitigating circumstances.[16]

Mason was not asked, nor did he testify, that as a result of this commitment, Mr. Foster spent nearly one year in Florida State Hospital before he was granted a competency discharge with a diagnosis of "schizophrenia, paranoid type, in remission." See I(D), infra.

[16] What may have caused the court of appeals' confusion about the evidence adduced in the sentencing trial is the absence of the trial exhibits from the record. They were not a part of the record provided by the state in federal habeas proceedings and only recently have been procured by counsel for Mr. Foster. (However, counsel did accurately describe these documents in his petition for rehearing in the court of appeals. See App. 48a-49a). Because these exhibits were absent, the court may have mistakenly believed that these exhibits were the same as the medical records maintained by Bay County Memorial Hospital and Florida State Hospital with respect to Mr. Foster. These medical records were not presented at trial, but they were presented at the evidentiary hearing in the district court as Petitioner's Exhibits 7 and 8. The court of appeals' reference to "medical records" having been presented at the sentencing trial, 707 F.2d at 1344 (App. 6a), indicates the strong possibility of such confusion, for the only records introduced at the sentencing trial were the involuntary commitment records, which are not likely to have been referred to as "medical" records. If indeed this mistake was made, the court's misreading of the record can be explained, for the medical records introduced in the district court proceeding do present the evidence which Mr. Mayo did not present at trial. See I(D), infra. Nonetheless, Mr. Foster explained this to the court, and rehearing was denied. See App. 47a-50a.

C. The Additional Evidence "Presented" to the Trial Judge

After the conclusion of the sentencing hearing, Mr. Mayo neither presented nor drew the trial judge's attention to any evidence in addition to that presented at the hearing. However, on his own the trial judge considered the reports of Mr. Foster's pre-trial competency evaluation by three psychiatrists in the course of determining Mr. Foster's sentence. See Foster v. State, 369 So.2d at 931.[17]

These reports provided the first -- and only -- evidence in the trial court of Mr. Foster's history of psychosis and impairment of his ability to appreciate the criminality of his conduct as a result thereof. However, as noted, only the trial judge was exposed to this evidence. The history was sketchily pieced together by all three psychiatrists:

> On one occasion early in 1971 he slashed his arms with a razor blade while in jail and was transferred to Florida State Hospital where he remained for nine months being treated, he says, with Thorazine and Mellaril. The use of these antipsychotic drugs suggests that he was at that time thought to be psychotic and he says he was improved at the time of his release but it seems possible that the improvement may have been due to enforced abstinence from alcohol. He has since reported occasionally to the Panama City Guidance Clinic where he has been given Valium, which is used for anxiety but is not an antipsychotic drug. He reports having had three seizures over the last 6 to 8 years but admits all of these followed alcohol withdrawal, hence a diagnosis of epilepsy is not indicated.

App. 59a (report of Dr. Lathan Crandall).

> Mr. Foster is a known patient of mine. I have been his psychiatrist on three admissions to the Mental Health Unit, namely from September 7 to September 29, 1972, January 14 to January 20, 1973, and October 17 to November 19, 1974. I have also treated him in the Day Care Program at Memorial Hospital from November 19, 1974 to December 3, 1974. According to records, he has also been hospitalized on the Mental Health Unit by Dr. John F. Mason in 1968 and then for 9 days in February 1974 and 12 days in September 1974. A third psychiatrist, namely Dr. John F. Cluxton hospitalized him on the Mental Health Unit from October 5, to October 8, 1974. A fourth local psychiatrist, namely Dr. Paul Bittick, Jr. has been involved with him

17 "Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar)...." The court knew this only because the trial judge reported that he had done so in his "Gardner" response, filed in the Florida Supreme Court on June 29, 1977.

> followed [sic] at the Bay County Guidance Clinic from February 24, 1972 to the present. In addition, the patient relates being hospitalized at Florida State Hospital for approximately nine months in 1970.... My clinical impression with these hospitalizations has been that of EMOTIONALLY UNSTABLE PERSONALITY, CHRONIC, WITH PSYCHOPATHIC TRAITS MANIFESTED BY ANXIETY AND DESPONDENCY WHEN UNDER STRESS; ACUTE AND CHRONIC ALCOHOLISM; SUICIDAL DEPRESSION; AND DRUG DEPENDANCE OF A PSYCHOLOGICAL TYPE TO ALCOHOL AND OTHER AGENTS. On numerous occasions over the years, attempts have been made to provide treatment to Mr. Foster for his drug abuse and emotional problems without success.

App. 60a-61a (report of Dr. John Sapoznikoff).

> Mr. Foster does present a history of a major seizure disorder dating back at least 8 years, and has been taking Dilantin, an anticonvulsant, to prevent these. He has not been observed having a seizure in any of his several hospitalizations here and I am unable to confirm or deny the presence of a seizure disorder.
>
> Foster also has a long history of abuse of various drugs and alcohol. He has had a number of hospitalizations on the mental health unit and has received various diagnoses including schizophrenia and character disorder. Both times he has been diagnosed as psychotic have followed bouts of alcohol abuse.

App. 65a (report of Dr. John Mason). From these accounts of Mr. Foster's history, it is clear that a strain of psychosis was consistently but not unanimously found in connection with his multiple psychiatric hospitalizations and commitments. However, the quality of the psychosis is difficult to ascertain from these accounts, and it is impossible to reconcile the diagnoses of Dr. Sapoznikoff with the diagnoses recounted by Dr. Mason and Dr. Crandall.

These differences, however, are not reflected so much in the three psychiatrists' conclusions with respect to Mr. Foster's sanity at the time of the offense. Dr. Mason found no evidence that Mr. Foster was insane but did find a "high probability" that his capacity to appreciate the criminality of his conduct was significantly impaired:

> At the time of the alleged offense, Mr. Foster freely admits he has been drinking, and it is highly probable that his ability to discriminate between right and wrong, or to adhere to the right is significantly impaired by alcohol. I can find no evidence, however, that he was or is insane.

App. 65a. Dr. Crandall agreed with Dr. Mason, but with less certainty:

> It is well known that excessive consumption of alcohol may produce temporary psychosis (insanity) in certain individuals and it seems possible that Foster may have been suffering from this condition at the time of the alleged crime but I know of no way of determining whether or not this was the case.

App. 59a. Dr. Sapoznikoff took no position on the impaired capacity issue but found only that Mr. Foster was sane at the time of the offense.[18]

This, then, was the entirety of the evidence available to the trial judge in his assessment of the mental mitigating circumstances relied on by Mr. Foster.

D. The Evidence Which Could Have Been -- But Was Not -- Presented

As demonstrated in the preceding paragraphs, the jury was presented with no evidence of Mr. Foster's psychosis or of his impaired capacity to appreciate the criminality of his conduct occasioned thereby. The trial judge, through no effort by Mr. Mayo, considered some evidence of these matters by his consideration of the reports of Mr. Foster's pre-trial competency evaluation. Neither the judge nor the jury, however, was presented with "substantial evidence of [Mr. Foster's] long history of psychiatric illness, including episodic psychosis, and paranoid schizophrenia...," Foster v. Strickland, 707 F.2d at 1349 n. 12 (emphasis supplied) (App. 11a). That evidence could only have been presented by the presentation of Mr. Foster's medical records -- alone or with the supporting testimony of the psychiatrists whose diagnoses are reflected therein. A sampling of what is contained in these records confirms the court of appeals' characterization of Mr. Foster's long history of serious mental illness as the kind of illness that is well-recognized as interfering with criminal responsibility, see 707 F.2d at 1349 n. 12 (App. 11a):

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[18] Dr. Sapoznikoff did note that in his experience with Mr. Foster, he had "never seen him to be psychotic." App. 63a.

[From the record of Mr. Foster's hospitalization at Bay County Memorial Hospital, admitted in the federal habeas hearing as "PX-7"; October 25-31, 1968, Dr. John F. Mason, attending psychiatrist:]

He presents with a twelve year history of antisocial behavior, numerous brushes with the law, repeated fights, self-mutilation, and difficulty in following any form of social acceptance. He was seen in the Bay County Guidance Clinic on the day of admission, where psychological testing revealed borderline psychosis. It was felt that he was about to break out into a full blown psychosis at any time, and he was admitted to the Psychiatric Unit as a psychiatric emergency to prevent this with medication....

FINAL DIAGNOSIS: SCHIZOPHRENIC REACTION, LATENT TYPE....

[From the records concerning Mr. Foster's involuntary hospitalization at Florida State Hospital, December 14, 1970 through September 2, 1971, admitted in the federal habeas hearing as "PX-8"; notes from a General Staff Conference, August 8, 1971, concerning whether Mr. Foster should be granted a competency discharge:]

Dr. Cespedes: "I believe this patient is in remission and that he may be sent back to the court to respond to his charges. His diagnosis is Schizophrenic, Paranoid Type, in remission."...

Dr. Pierson: "In my opinion there is little doubt that this was schizophrenic and he is currently schizophrenic in remission. The problem is whether he should continue in the hospital or a deliberate calculated risk should be taken and he should be released. In my opinion this patient will not gain anything further from hospitalization and although he does represent a risk, I think this is a risk which has to be taken, otherwise, this patient will remain permanently institutionalized until he dies because I do not imagine there will be any further improvement from either chemotherapy, group therapy or hospital milieutherapy and I would therefore recommend that he be released only understanding he does present a more than average risk."

[From PX-7, hospitalization of February 12-21, 1974, Dr. John F. Mason, attending psychiatrist:]

This 27 year old divorced Caucasian male with a long history of Schizophrenia was seen again in the Emergency Room; complaining of bizarre symptology [sic], namely his brains were hurting and rotting. He was admitted to the Mental Health Unit where physical exam was essentially normal...

FINAL DIAGNOSIS: PARANOID SCHIZOPHRENIA....

E. The State Law Consequences of Counsel's Decision Not To Present Evidence of Mr. Foster's Psychosis and its Impact on his Criminal Responsibility

As noted, this Court has been careful in its eighth amendment rulings respecting mitigating circumstances not to interfere with the state courts' right to determine what weight should be given to mitigating evidence.

> The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. at 114-115. See also Barclay v. Florida, ___U.S. at ___, 103 S.Ct. at 3430 n. 2 (concurring opinion). Accordingly, state law governs the quality and quantity of evidence that must be adduced in order to "establish" or require the sentencer to "find" and "weigh" mitigating circumstances in the balancing process of sentence determination.

In Florida, the standards governing the proof of the statutory mental mitigating circumstances are well-developed, having been applied in more than fifty cases by the Florida Supreme Court. Pursuant to these standards, had Mr. Mayo presented the available, medical-record-based evidence of Mr. Foster's psychosis and impaired capacity, the jury and the trial judge would have been compelled to "find" and give substantial weight to the statutory mental mitigating circumstances. On the basis of the evidence he did present, however, as well as what the trial judge considered sua sponte, neither the jury nor the trial judge was required to find mental mitigation.

In Florida, unless the evidence rises to a certain level, "[s]o long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984). The finding that there is no mental mitigating circumstance will amount to an abuse of discretion, however, when three conditions are met:

(a) when there is "almost total agreement" among experts, Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977), or "overwhelming evidence," Quince v. State, 414 So.2d 185, 187 n.3 (Fla. 1982), that the defendant suffers from a mental illness;[19]

(b) and that illness was a "controlling influence," Huckaby 343 So.2d at 33, on the defendant at the time of the crime, ibid.; Mines v. State, 390 So.2d at 337; cf. McCrae v. State, 395 So.2d 1145, 1149-50, 1154-55 (Fla. 1981) (jury's life recommendation overruled because it could have been based only on psychiatric testimony, but the psychiatrist could not state "with any degree of medical certainty" whether the mental illness was a controlling influence);[20] Adams v. State, 412 So.2d 850, 857 (Fla. 1982) (little or no causal relationship; no finding of mental mitigation required); Michael v. State, 437 So.2d 138, 141 (Fla. 1983) (no evidence of causation even though mental illness may have made defendant incompetent to stand trial; no finding of mental mitigation required); and

(c) the illness is a form of psychosis or its equivalent, in that there is settled opinion in the mental health community concerning the impairment of criminal capacity occasioned by such illness.[21]

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19 See also Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Mann v. State, 420 So.2d 578, 581 (Fla. 1982). Cf. Goode v. State, 365 So.2d 381, 382-83, 384 (Fla. 1979) (two of three psychiatrists found no psychosis; no finding of mental mitigation required); Moody v. State, 418 So.2d 989, 995 (Fla. 1982) (only lay testimony as to defendant's belief he was told by God what to do; no finding of mental mitigation required); Martin v. State, 420 So.2d 581, 584 (Fla. 1982) (experts evenly divided; no finding of mental mitigation required); Johnson v. State, 442 So.2d 185, 189 (Fla. 1984) (same).

20 In general the "life recommendation" cases proceed under a different standard -- whether the jury reasonably could have based its recommendation on mental mitigating circumstances --but McCrae makes it clear that the "proximate cause" element must be satisfied even in life recommendation cases. See Gardner v. State, 313 So.2d 675, 679 (Fla. 1975); Jones v. State, 332 So.2d 615, 617-19 (Fla. 1975); Chambers v. State, 339 So.2d 204, 205, 207-08 (Fla. 1976); Burch v. State, 343 So.2d 831, 833-34 (Fla. 1977); Shue v. State, 366 So.2d 387, 389-90 (Fla. 1978); Stevens v. State, 419 So.2d 1058, 1064 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731-32 (Fla. 1983).

21 The presence of psychosis thus compels the finding of mental mitigating circumstances, despite contrary findings by the trial judge: Huckaby v. State, supra (schizophrenia; brain damage causing violent behavior); Mines v. State, supra (paranoid schizophrena); Mann v. State, supra (psychotic depression; paranoid feelings of rage). Intoxication from alcohol and/or drugs at the time of the offense, however, does not compel the finding of mental mitigation: Songer v. State, 322 So.2d 481, 484 (Fla.

Accordingly, when the evidence tendered in support of mental mitigating circumstances satisfies these three conditions, mental mitigation must be found and given substantial weight, cf. Quince v. State, 414 So.2d at 186-187 ("great weight" need not be given to mental mitigation unless the trial judge was compelled to find it), in the balancing process of sentence determination. A trial judge's finding that there is no mental mitigating circumstances under such conditions will be set aside as a "palpable abuse of discretion." Pope v. State, 441 So.2d at 1076.

There can be little doubt that if Mr. Mayo had adduced the full proof of Mr. Foster's history of mental illness and its impact upon his capacity to differentiate right from wrong, the finding of mental mitigating circumstances would have been compelled and substantial weight would have been required to be accorded these circumstances in the sentencing process. On the basis of Mr. Foster's complete medical history, there is certainly "overwhelming evidence" and "almost total agreement" with respect to his suffering mental illness, which included an incurable form of paranoid schizophrenia, acute and chronic alcohol-induced psychotic episodes, and psychotic organic brain

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1975); Hall v. State, 403 So.2d 1321, 1324-25 (Fla. 1981); Buford v. State, 403 So.2d 943, 947, 953 (Fla. 1981); Combs v. State, 403 So.2d 418, 420, 421 (Fla. 1981); Hitchcock v. State, 413 So.2d 741, 747 (Fla. 1982); Simmons v. State, 419 So.2d 316, 319, 320 (Fla. 1982); Harich v. State, 437 So.2d 1082, 1084-85, 1086, 1087 (Fla. 1983) (despite uncontradicted testimony by psychologist that statutory mitigating circumstances were met); Randolph v. State, ___ So.2d ___, 8 F.L.W., S.C.O. 446 (11-18-83); Preston v. State, ___ So.2d ___, 9 F.L.W., S.C.O. 26, 28, 29 (1-19-84). Nor do personality or character disorders: Hargrave v. State, 366 So.2d 1, 5-6 (Fla. 1979); Stone v. State, 378 So.2d 765, 772, 773-74 (Fla. 1980); Lucas v. State, 376 So.2d 1149, 1153-54 (Fla. 1979); Sireci v. State, 399 So.2d 964, 971 (1981); Smith v. State, 407 So.2d 894, 899, 901-903 (Fla. 1983); Fitzpatrick v. State, 437 So.2d 1072, 1078, 1079 (Fla. 1983). While post-traumatic stress syndrome may yet rise to the level of psychosis in Florida law, "[t]he evidence...is not yet clear enough" to compel the finding of a mental mitigating circumstance. Middleton v. State, 426 So.2d 548, 553 (Fla. 1983); accord, Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984). Finally, when there is no evidence of "psychosis," "insanity," "mental illness," or "emotional disturbance," despite the occasional occurrence of bizarre behavior or the presence of "some disorder," the finding of mental mitigation is not compelled: Alvord v. State, 322 So.2d 533, 538-40 (Fla. 1975); Meeks v. State, 336 So.2d 1142, 1143, 1145 (Fla. 1976); LeDuc v. State, 365 So.2d 149, 150-52 (Fla. 1978); Goode v. State, 365 So.2d 381, 382-83, 384 (Fla. 1979); Jackson v. State, 366 So.2d 752,757 (Fla. 1978); Adams v. State, 412 So.2d 850, 857 (Fla. 1982); Moody v. State, 418 So.2d 989, 995 (Fla. 1982); King v. State, 436 So.2d 50, 55 (Fla. 1983); Mason v. State, 438 So.2d 374, 379 (Fla. 1983).

syndrome. Moreover, these records and the expressed opinions of the psychiatrists who evaluated Mr. Foster before trial show that it is "highly probable" that Mr. Foster's illness impaired his capacity to appreciate the criminality of his conduct on the night of the homicide herein.

There can be just as little doubt, however, that the evidence which Mr. Mayo did adduce at trial did not compel the finding of mental mitigation. The evidence presented to the jury and the judge in the sentencing trial showed "some disorder" but not a disorder comparable to psychosis. Moreover, that disorder was in no way shown to have impaired Mr. Foster's capacity to appreciate the criminality of his conduct at the time of the homicide. At most, his disorder could have caused him to have "very poor control." (PX-1E: 617). Thus, the evidence was typical of evidence which does not compel the finding of mental mitigation. See, e.g., Hargrave v. State, 366 So.2d at 5-6; Goode v. State, 365 So.2d at 382-83, 384; Smith v. State, 407 So.2d at 899, 901-03. Even when the additional evidence considered only by the trial judge is accounted for, thus establishing a sufficient causal relationship between Mr. Foster's disorder and the crime, this evidence still does not "overwhelming[ly]" indicate psychosis as the disorder from which he suffered. Accordingly, even the additional evidence considered by the trial judge did not compel the finding of mitigation. See, e.g., Harich v. State, 437 So.2d at 1084-85, 1086, 1087; Johnson v. State, 442 So.2d at 189.

In sum, while there was sufficient evidence in support of mental mitigating circumstances in Mr. Foster's case to compel the finding of such circumstances and the giving of "great weight" to such circumstances in the sentence determination, that evidence was not provided to the jury or judge who jointly determined Mr. Foster's sentence.

F. Ineffective Assistance of Counsel: The Eighth Amendment Concern.

The facts in Mr. Foster's case thus present a critically important question concerning the effective assistance of counsel in the area of representation which has been least subject to

challenge: the choice by counsel to present certain evidence and not other evidence. Because of the underlying eighth amendment concern for reliability in the capital sentencing process which is evoked by these facts, we submit that, tradition notwithstanding, the representation afforded Mr. Foster must be held ineffective.

The facts themselves compel this conclusion. Mr. Mayo knew that the only defense against death was, as he put it, "Kenny's incompetency" (H.T. 63). Mr. Mayo claimed to have conducted a full investigation of mental mitigation and as a result, testified that he knew all of the available evidence in support thereof, including the contents of the medical records from the state hospital and the psychiatric unit of the county hospital (H.T. 19-22). And yet, Mr. Mayo failed to present the evidence Florida law required that he present (and which was available) in order to compel the sentencer to weigh mental mitigation in the balancing process of sentence determination: overwhelming evidence of psychosis and its impairment of Mr. Foster's ability to differentiate right from wrong.

Overarching these facts is the fundamental eighth amendment requirement that death not be imposed in disregard of the factors about an individual or his crime that mitigate against death. Critically, Virgil Mayo's decision not to present the available evidence which would have assured that death would be imposed against Mr. Foster only after such mitigating concerns were fully weighed, abrogated this requirement. And as a result, his representation created the risk that death was imposed "in spite of" such concerns. Lockett, 433 U.S. at 605. Under these circumstances the eighth amendment compels a finding of ineffective assistance. There can be no reasonable basis for Mr. Mayo's decision, despite the tradition which presumes that presentation-of-evidence decisions are inherently reasoned, and presumably reasonable, decisions.

Similarly, the prejudice accruing to Mr. Foster from the ineffectiveness of his counsel cannot be gainsaid. Because counsel's presentation of evidence permitted the jury and the judge to disregard Mr. Foster's only defense against death,

counsel's defaults in all likelihood affected the outcome of the trial. Certainly in other cases, where the mental mitigating evidence was of the same quality as the evidence which could have been presented on behalf of Mr. Foster, and where the trial judge disregarded such evidence (for reasons other than the non-presentation of the evidence), the Florida Supreme Court has determined that the outcome was sufficiently influenced by the disregard of mental mitigation to require a new sentencing hearing. Mines v. State, supra; Mann v. State, supra. Indeed in one such case the evidence was held as a matter of law to require imposition of a life sentence. Huckaby v. State, 343 So.2d at 33-34. Thus, there can be no genuine issue as to prejudice. Whether viewed from the perspective of the jury's recommendation

of death,[22] or of the judge's determination to impose death,[23] Mr. Foster was sufficiently prejudiced by counsel's ineffective assistance to prevail upon his claim.

For these reasons, the Court should review the fundamentally important questions presented by Mr. Foster's claim of ineffective assistance of counsel.

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[22] To be sure, even if the Court concluded that the trial judge's consideration of the three pretrial psychiatric evaluations cured Mr. Mayo's failure to present medical-record-based evidence -- before the judge -- this did not cure Mr. Mayo's default before the jury, who knew none of the facts contained in such reports. On the basis of the evidence before the jury, the jury clearly was not compelled to weight mental mitigation. In an analogous set of circumstances, the Florida Supreme Court has held that the failure of the trial judge to permit the jury to hear such evidence -- despite reserving the right to hear it himself -- so infects the reliability of the advisory sentence as to require resentencing before a new jury. Miller v. State, 332 So.2d 65, 67-68 (Fla. 1976); Messer v. State, 330 So.2d 137, 142-143 (Fla. 1976). No different result should obtain here. See Simmons v. State, 419 So.2d 316, 319, 320 (Fla. 1982) (new jury sentencing required where mitigating evidence is excluded).

[23] Since the trial judge's findings are ambiguous as to whether he considered mental mitigating circumstances, see II, infra, it may be argued that the judge found mental mitigation, but simply found that it was outweighed by the aggravating circumstances. This view may be even more attractive in light of the judge's consideration of mental mitigating evidence which the jury did not have (the pretrial competency evaluation reports). If the judge did find mental mitigation, the argument would then conclude that no prejudice has been shown. Two responses provide a complete rebuttal, however. First, since even the evidence considered by the judge did not, under Florida law, require that he give any weight to mental mitigation, much less "great weight," see pages 26-29, supra, and his findings do not clearly show that he gave any weight to mental mitigation, we cannot assume that he did. The more appropriate assumption, given the character of the evidence he considered, is that he did not. In either event, however, since the evidence permitted him not to give any or much weight to mitigation, see Quince v. State, 414 So.2d at 186-187, the risk forbidden by the eighth amendment was present, and prejudice thus accrued to Mr. Foster. See Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring) (where such a risk is present, "we may not speculate" that the risk was not realized). Second, even if there were no prejudice before the trial judge, the prejudice before the jury is sufficient for Mr. Foster to prevail on his claim of ineffective assistance. See note 22, supra.

II

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT OF APPEALS, HAVING PROPERLY EXERCISED ITS DISCRETION TO REVIEW AN ISSUE RAISED IN THE DISTRICT COURT BUT NOT ON APPEAL AND HAVING DECIDED THE CASE ON THE BASIS OF THAT ISSUE, CAN THEREAFTER REVOKE ITS INITIAL DECISION TO REVIEW THE ISSUE WHEN THE REVOCATION AMOUNTS TO AN ABUSE OF DISCRETION.

When the court of appeals announced its decision in Mr. Foster's case on June 27, 1983, Mr. Foster was the prevailing party. The claim upon which he prevailed was the claim that the trial judge's failure to make findings of fact with respect to mitigating circumstances deprived him of his eighth and fourteenth amendment right to meaningful appellate review. 707 F.2d at 1347-1351 (App. 9a-13a). While Mr. Foster had raised and litigated this claim in district court proceedings, he had not raised it on appeal. The court of appeals nonetheless held, without dissent as to this matter, that the issue could be reviewed in the appeal of the district court's order denying the writ of habeas corpus. Id. at 1348 n. 11 (App. 10a). The bases for the court's decision to review this issue were (a) that the issue concerned a "fundamental constitutional deficienc[y]," and (b) that "it is well within a reviewing court's discretion to consider fundamental constitutional deficiencies raised by a petitioner originally and not pursued on appeal." Id. (emphasis supplied). Abruptly thereafter on November 3, without notice to Mr. Foster of the Court's contemplated action and without any opportunity for Mr. Foster to comment, the Court issued a sua sponte reversal -- for the sole reason that "the failure of the appellant to raise the issue ... in its [sic] brief or in oral argument before us forecloses our consideration of the issue sua sponte." (App. 16a)

The question presented by this procedural history is whether in the court of appeals' ultimate handling of this matter, the court "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court. We submit that it has. Once having properly exercised its discretion to review an issue it was not bound to review, and having thereafter decided the case on that issue, we

submit that the court was no longer free to undo this exercise of discretion at its whim. At the very least, the revocation of such a discretionary decision must itself be guided by abuse of discretion principles. Such principles dictate in this context that the court of appeals be required to reinstate its judgment on the merits of this matter.

At the outset there can be no dispute that the court of appeals acted within the limits of its jurisdiction when it decided to review an issue litigated in the district court but not raised an appeal. The court relied on Langnes v. Green, 282 U.S. 531 (1931), for the proposition that on an appeal in the court of appeals, just as on an appeal or certiorari grant in this Court,

> The entire record is before [the] court with power to review the action of the [lower court] and direct such disposition of the case as that court might have done upon [the petition for writ of habeas corpus].

282 U.S. at 537. It cannot be gainsaid that the court of appeals thus had the power to review any issue presented to the district court.

Nor can there be any dispute that the court's exercise of its discretion to review an issue raised in the district court but not on appeal was proper. As the Court noted in Langnes,

> [t]he term "discretion" denotes the absence of a hard and fast rule.... When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

282 U.S. at 541. The court of appeals' decision to review a "fundamental constitutional deficienc[y]" was thus in perfect harmony with this Court's view of "sound discretion."[24]

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[24] In respondents' petition for rehearing of the June 27 decision, the only "prejudice" which respondents asserted from the court's sua sponte review of this issue was their lack of "opportunity to address [the issue] until now." To the extent both parties may have been equally prejudiced in this manner, the appropriate remedy was not a revocation of the review of the issue, but supplemental briefing.

Upon the court of appeals' proper exercise of its discretion, we submit that this Court should hold that the court of appeals cannot revoke its discretionary decision -- as it did here -- without adhering to the same principles which informed its initial exercise of discretion, i.e., that any revocation of the discretionary action not be done "arbitrarily or willfully, but with regard to what is right and what is equitable under the circumstances...." Ibid.

On the basis of such a holding, the court of appeals' revocation of its discretionary decision to review this issue should be reversed, for it was was wholly arbitrary, as demonstrated by the following:

First, the court of appeals based its revocation of the decision to review this issue entirely upon the following: "the failure of the appellant to raise the issue concerning 'the trial court's findings of fact in support of sentence' in its brief or in oral argument before us forecloses our consideration of the issue sua sponte. Cf. Stephens v. Zant, 716 F.2d 276 (5th Cir. 1983), on remand from the Supreme Court of the United States." (App. 16a) (emphasis supplied). Thus, the revocation was based solely upon the view that the court believed that it was in error when it decided to review this issue sua sponte due to its view, "[u]pon further consideration," that it lacked the power to review the issue -- i.e., petitioner's failure to raise the issue on appeal "forecloses our consideration sua sponte." However, there is absolutely no support for the court's change in view subsequent to June 27, 1983, when it held that the review of the issue was "well within" its discretion. 707 F.2d at 1348 n. 11 (App. 10a). Between June 27, and November 3, 1983, the law concerning the court of appeals' power to review issues in the procedural posture of this issue did not change. In Stephens v. Zant, the only authority cited by the court in support of its change of view concerning its power herein, the petitioner urged the court to reach issues which had not been presented in the district court. Wholly unlike Mr. Foster's situation, Stephens invited the court to act outside its jurisdiction, to reach issues not previously presented to the lower court. Cf. Langnes

v. Green, 282 U.S. at 537. The court could not accept the invitation without expanding the jurisdiction of the district court. There is no similar problem here. The court clearly was not "foreclose[d]" by petitioner's failure to raise the issue.

Second, the court did not indicate that its initial exercise of discretion was unsound (assuming the power to have exercised its discretion in such a fashion). The court did not suggest that it no longer viewed the issue relied upon as a "fundamental constitutional deficienc[y]," no longer requiring its exercise of sound discretion to review the issue. Yet, the only explanation for such action -- disguised behind the specious citation to Stephens v. Zant, supra -- must be that the court of appeals' no longer viewed the issue as "a fundamental constitutional deficienc[y]." In all likelihood, the court reached this conclusion sub silentio, because, it no longer viewed the issue as correctly decided in light of this Court's capital decisions in the interim in Zant v. Stephens, and Barclay v. Florida -- as argued by respondents in their rehearing petition. But this is the very reason the court should have ordered supplemental briefing, rather than summarily reversing itself!

The policy which the Court has embodied in Rule 40 of the Federal Rules of Appellate Procedure -- that "a petition for rehearing will ordinarily not be granted in the absence of [an answer to the petition]" -- confirms this. Unless a petition for rehearing should so clearly be granted that there can be no genuine dispute as to the propriety of its grant, the opponent of the petition must be given the opportunity to respond. Cf. United States v. Allegheny-Ludlum Industries, Inc., 568 F.2d 1073 (5th Cir. 1978). And there was great room for dispute over the propriety of granting the state's petition for rehearing here.

While Zant and Barclay did, as the respondents argued in their petition for rehearing, undermine the rationale of the court's decision on this issue, Zant and Barclay in no way required a different result. Both reaffirmed the constitutional necessity of appellate review of the sentencing decision, Zant v. Stephens, ___U.S.___, 103 S.Ct.2733, 2742 (1983); Barclay, 103 S.Ct. at 3428 (plurality opinion); id. at 3436-3437 (Stevens, J.,

joined by Powell, J., concurring), and both held that every procedure mandated by a state capital sentencing scheme is not constitutionally required, Zant v. Stephens, ___U.S.___,at 2741-2744; Barclay, at 3424 (plurality opinion); id. at 3429 (concurring opinion). However, neither suggested in any way that the requirement of Florida's capital sentencing scheme, that the trial court, in imposing a death sentence,

> shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist... and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances [,]

Fla. Stat. §921.141(3), was no longer constitutionally necessary to permit meaningful appellate review in Florida. See Gardner v. Florida, 430 U.S. 349, 361 (1977). [25] See also Proffitt v. Florida, 428 U.S. 242, 250-51 (1976).[26] Cf. Pulley v. Harris, ___U.S.___, 104 S.Ct. 871, 881-883 (Stevens, J., concurring). Accordingly, the adequacy of the trial judge's findings with respect to mitigating circumstances in Mr. Foster's case continues to present a constitutional claim based upon the capital defendant's right to meaningful appellate review.

In sum, there is no rational basis upon which the court of appeals could have decided to revoke its discretionary decision to review the claim which it decided in Mr. Foster's favor. The decision to review this issue was, as the court initially held, "well within" the court's proper exercise of discretion, 707 F.2d at 1348 n. 11 (App. 10a). Moreover, the court's exercise of discretion was and still is sound: the result the court reached with respect to this issue is still supportable in light of this

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25 "[I]t is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

26 "Since... the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible...." Id. at 251.

Court's death penalty decisions issued subsequent to the court of appeals' decision. Accordingly, certiorari should be granted, and Mr. Foster's case should be remanded to the court of appeals with instructions to reinstate its June 27, 1983 opinion as issued and to permit Mr. Foster to respond to the petition for rehearing by respondents.

CONCLUSION

For the reasons set forth herein, petitioner respectfully requests that the Court grant his petition.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES KENNETH FOSTER,

Petitioner,

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A P P E N D I X

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Charles Kenneth FOSTER, Petitioner,

v.

Charles G. STRICKLAND, Jr., et al., Respondents.

No. 81-5734.

United States Court of Appeals, Eleventh Circuit.

June 27, 1983.

As Amended on Denial of Rehearing En Banc Nov. 3, 1983.

Petitioner, who received death penalty in Florida capital murder case, appealed from denial by the United States District Court for the Northern District of Florida, Lynn C. Higby, J., 517 F.Supp. 597, of his petition for writ of habeas corpus. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) petitioner failed to establish incompetency of his counsel in guilt and penalty phases of his trial; (2) finding that aggravating circumstances outweighed mitigating circumstances was not subject to due process requirement of proof beyond a reasonable doubt; (3) statement of Florida Supreme Court that non-record information did not affect its judgment ended the matter; and (4) petitioner failed to adduce sufficient facts to establish a constitutional claim relating to issue of whether certain instructions precluded jury from considering nonstatutory mitigating circumstances.

Affirmed.

Roney, Circuit Judge, dissented and filed opinion.

1. Habeas Corpus ⇐25.1(6)

In order to establish a claim of constitutionally deficient representation that may be redressed in a habeas action, petitioner must not only show ineffective assistance, he must also demonstrate that the ineffec-

tive assistance created not only a possibility of prejudice but that it worked to his actual and substantial disadvantage.

2. Habeas Corpus ⇐85.5(11)

Habeas petitioner failed to establish that defense counsel was ineffective in failing to adequately investigate issue of petitioner's competency.

3. Habeas Corpus ⇐25.1(6)

Petitioner, who preempted his attorney's strategy choice, could not, on petition for writ of habeas corpus, claim as erroneous the very defense he demanded his attorney present.

4. Criminal Law ⇐641.13(7)

Defense counsel's manner of presentation of mitigating evidence during sentencing phase in capital murder trial did not rise to level of constitutionally ineffective assistance of counsel.

5. Criminal Law ⇐986.6(3)

Under Florida bifurcated death penalty trial which provided for guilt and penalty phases, Florida sentencing determination was separate proceeding dealing with facts that were not elements of the crime itself and, thus, finding that aggravating circumstances outweighed mitigating circumstances was not subject to due process requirement of proof beyond a reasonable doubt. U.S.C.A. Const.Amends. 5, 14.

6. Habeas Corpus ⇐45.2(4)

Even if members of Florida Supreme Court, on direct appeal of defendant's capital murder conviction, solicited nonrecord information with thought that it should, would or might be used in review of petitioner's death sentence, decision of the Florida court that it should not be so used, the statement that it was not used, and rejection of notion that it affected judgment of the court ended the matter when addressed at constitutional level in habeas proceeding.

7. Habeas Corpus ⇐30(1)

Petitioner, who failed to object at trial or raise, on direct appeal, issue that trial judge's instructions in capital murder case precluded jury from considering nonstatutory mitigating circumstances, failed to adduce prejudice sufficient to overcome *Sykes* default doctrine in order to establish a constitutional claim deserving of redress in habeas action.

Steven L. Seliger, Tallahassee, Fla., Richard H. Burr, III, West Palm Beach, Fla., for petitioner.

Gregory C. Smith, Asst. Atty. Gen., Tallahassee, Fla., for respondents.

Appeal from the United States District Court for the Northern District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Charles Kenneth Foster appeals from the district court's denial of his petition for a writ of habeas corpus. Petitioner was convicted of first degree murder in Florida and sentenced to death. In this collateral appeal, he challenges: (1) the competency of his counsel in the guilt and penalty phases of his trial; (2) the constitutionality of instructions to the jury on the weighing of aggravating against mitigating circumstances; (3) the Florida Supreme Court's alleged use of non-record material in reviewing his sentence; and (4) the constitutionality of jury instructions allegedly limiting consideration of non-statutory mitigating circumstances.

After a careful review of the entire record, including petitioner's state trial transcript and the transcript of his federal habeas evidentiary hearing, we affirm the district court's decision with respect to these claims. We are compelled, however, to re-

verse because of the trial judge's inadequate findings of fact on the mitigating circumstances, as required by the Florida Death Penalty statute. It is impossible to determine whether petitioner's sentence was the product of reasoned judgment rather than of caprice and arbitrariness, and thus whether it comports with the constitutional requirements expressed by the Supreme Court. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

I. BACKGROUND

Petitioner was convicted of first degree murder and robbery for the July 15, 1975, killing of Julian Lanier. Petitioner apparently met Lanier for the first time at a bar on the evening of July 14, where they became acquainted over several drinks. Lanier asked petitioner if he knew of any women they could hire to engage in sexual relations. Petitioner and Lanier then traveled to another bar where they met two women, at least one of whom knew petitioner, and persuaded them to travel to a remote wooded area in Lanier's motorhome. Both petitioner and Lanier were, apparently, quite intoxicated.

In the early morning hours of July 15, just as Lanier and one of the women were about to engage in sexual intercourse, petitioner, without provocation, screamed that Lanier was taking advantage of his sister and brutally attacked Lanier with his fists. Petitioner then slit Lanier's throat with a knife. With the assistance of the two frightened women, petitioner dragged Lanier out of the motorhome to the woods and covered him, face down, with sticks and leaves. Hearing him breathing, petitioner, with one slice, severed Lanier's spinal cord at the base of his neck. Petitioner and the two women returned to the motorhome, where they allegedly then found Lanier's wallet and divided the money it contained.

Police, acting on information provided by the women, arrested petitioner on the day of the murder. Five days later petitioner gave the police a detailed confession of the crime. His subsequent motion to suppress the confession was denied. Petitioner's appointed counsel then filed a suggestion of insanity, and three court appointed psychiatrists examined petitioner. Two of these psychiatrists had treated petitioner extensively before for emotional disturbances. All three determined that petitioner was competent to stand trial and that he was likely sane when he committed the crime. The court adopted the psychiatrists' conclusions.

Petitioner was found guilty by a jury on October 3, 1975, of murder in the first degree, Fla.Stat.Ann. 782.04(1) (West Supp. 1982), and of robbery. During the trial, Foster made a dramatic witness stand confession. The jury recommended the death penalty. Judge Spear sentenced petitioner to death on the murder charge and life imprisonment on the robbery charge. Petitioner's motion for a new trial was denied. The Florida Supreme Court, in an automatic appeal mandated by Florida's death penalty statute, affirmed petitioner's conviction and sentence. *Foster v. State*, 369 So.2d 928 (Fla.1979). A motion for rehearing was denied, as was a petition for certiorari to the United States Supreme Court. 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 1116 (1979).

On May 5, 1981, the Governor of Florida signed a death warrant ordering petitioner's execution on June 3, 1981. The Florida Circuit Court denied petitioner's application for a stay of execution and motion for post-conviction relief on May 15, 1981. The Florida Supreme Court affirmed this decision on May 28, 1981. 400 So.2d 1 (Fla. 1981).

The United States District Court for the Northern District of Florida granted a stay of execution when petitioner sought habeas relief from the district court. 515 F.Supp. 22 (N.D.Fla.1981). After a two day evidentiary hearing, the district court denied the petition for a writ. 517 F.Supp. 597 (N.D. Fla.1981). Petitioner appealed to this Court. After hearing oral argument in the

case, we deferred consideration until this Court issued its *en banc* decision in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.1983), because that decision addresses several issues which we face here. We now proceed to a consideration of each of petitioner's claims.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Fourteenth Judicial Circuit Public Defender Virgil Mayo assumed representation of Foster's case from an assistant about a month before the trial. Mayo has been a member of the Florida Bar since 1951. He has represented defendants at numerous criminal trials, having held the public defender's position since 1963. His experience with capital cases under the recently amended death penalty statute was limited, as was every other attorney's at the time, although Mayo had tried cases under the old statute before it was invalidated by the Supreme Court's decision in *Furman v. Georgia*. Mayo was assisted in the defense by Bill Wagers, a new assistant public defender, whom the district court noted was a highly competent criminal defense lawyer.

Foster asserts that his trial counsel rendered ineffective assistance at both the guilt and penalty phases. We turn to these contentions.

A. *Guilt Phase*

Petitioner alleges that his counsel failed to provide adequate representation during the guilt phase of his trial. He cites numerous instances of this alleged inadequacy, the most significant of which are that: (1) Mayo failed to inform the examining psychiatrist and the court of Foster's "irrational behavior" exhibited at pre-trial conferences; (2) Mayo failed to challenge the psychiatrists' reports on competency by interviewing the psychiatrists and requesting a competency hearing rather than merely submitting the competency issue on the basis of the reports;[1] (3) Mayo failed to raise effectively the competency issue after the confession and after he discovered Foster's use of Valium during the trial; and (4) Mayo failed to investigate and present an insanity defense.

[1] In evaluating petitioner's claim, we note that he was not entitled to, "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.1960), *modified*, 289 F.2d 928 (5th Cir.), *cert. denied* 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). In order to establish a claim of constitutionally deficient representation that may be redressed in a habeas action, petitioner must not only show ineffective assistance, he must also "demonstrate that the ineffective assistance created not only 'a *possibility* of prejudice but that [it] worked to his *actual* and substantial disadvantage.'" *Washington v. Strickland*, 693 F.2d 1243, 1258 (5th Cir.1982) (Unit B, *en banc*), *quoting United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original).

[2] It is clear from the record that defense counsel performed his duties competently and conscientiously.[2] Mayo did not

1. We restrict our consideration here to whether Mayo was ineffective and do not address the issue of whether Foster was indeed incompetent because that issue has not been raised properly before this Court.

2. We reach this conclusion after conducting an independent analysis of the facts of this case, as this Court has required:

> Whether counsel has rendered effective assistance is a mixed question of law and fact which requires the appellate court to independently apply legal principles to the district court's findings of basic common historical facts of the case. *Young v. Zant*, 677 F.2d 792, 798. Thus, while we must defer to the district court's finding as to what counsel did or did not do, absent a clearly erroneous determination, we independently evaluate whether counsel's representation satisfied the standards of the Sixth and Fourteenth Amendments.

Adams v. Balkcom, 688 F.2d 734, 739 (11th Cir.1982). *See Washington v. Watkins*, 655 F.2d 1346, 1351–56 (5th Cir.1981).

The final result of our analysis would not differ if we regarded the district court's finding of effective assistance as a question of fact entitled to a presumption of correctness that is reversible only if "clearly erroneous," as argu-

fail to discover information that was necessary for the competent defense of Foster. The district court did not clearly err, based upon our review of the record, in finding that Mayo interviewed Foster's mother and that he studied all the relevant medical records, including the psychiatric reports of Foster's medical records at the hospitals and clinic where his emotional disturbances were treated. Mayo investigated adequately the competency issue.

Three psychiatrists examined Foster at the court's request, two of whom, Dr. Mason and Dr. Sapoznikoff, had treated him extensively for prior episodes of emotional disturbance. The unanimity of the three professionals that Foster was competent to stand trial and legally sane at the time of the crime weighs heavily against the suggestion that Mayo, by requesting a hearing, somehow could have altered the outcome of the competency determination. Moreover, it does not appear that Mayo possessed any unique information that would have contributed measurably to the doctors' or the court's competency determinations. While Mayo's testimony indicates he had serious doubts about Foster's psychiatric health, the testimony does not demonstrate that Mayo believed Foster was *legally* incompetent to stand trial in Florida.

Nor did Mayo act inappropriately following Foster's in-court confession. Mayo promptly raised the competency issue after the confession by moving for a continuance and additional psychiatric examinations. The denial of this motion should not reflect upon Mayo's effectiveness in raising this issue. Nor is it apparent that Mayo should have challenged Foster's competency to stand trial when he later learned that petitioner was taking Valium during the trial. The record fails to indicate that the district court erred in finding that Foster did not sleep through much of his trial and that, in light of Foster's extensive history of prescription and nonprescription drug use, a dosage of 10 milligrams three times per day of a mild sedative had an insignificant effect on Foster's ability to appreciate the surrounding events.

[3] Petitioner also alleges that Mayo failed to investigate and present an insanity defense. The facts as found by the district court indicate that Mayo had no choice but to refrain from doing so. Mayo apparently favored presenting a second degree murder defense based upon a "depraved mind." Mayo felt he could "sell" such a defense to the jury, based upon Foster's unpredictable and disturbed past and the fact that the victim was drunk and engaging a prostitute at the time of the murder. Over the course of several pre-trial conferences, Mayo also explored with petitioner the consequences of pleading not guilty by reason of insanity. Foster rejected both of these defense strategies and insisted that he pin the blame on the two women present at the murder and attribute his inaction at the time of the killing to one of his infrequent epileptic fits. In light of Foster's adamance, Mayo had an ethical obligation to comply with his client's wishes and was thus unable to present an insanity defense.[3] Petitioner, who preempted his attorney's strategy choice, cannot

ably suggested by the Supreme Court's analysis in *Pullman Standard v. Swift*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

3. Ethical Consideration 7-7 of the American Bar Association Code of Professional Responsibility provides:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, are binding on his lawyer.... A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Ethical Consideration 7-8 provides, in pertinent part:

> In the final analysis, however, the lawyer should always remember that the decision to forego legally available objectives and methods because of non-legal factors is ultimately for the client and not for himself.

now claim as erroneous the very defense he demanded Mayo present.[4]

B. *Sentencing Phase*

Petitioner contends that Mayo failed to utilize properly his expert witness, Dr. Mason, to convey the impact of Foster's mental illness upon Foster's ability to appreciate the criminality of his conduct. Petitioner also urges that Mayo was ineffective because he failed to present testimony by friends and family of Foster's "crazy behavior." Thus, petitioner claims, the jury and the judge did not have before them crucial evidence supporting several mitigating circumstances.[5]

Mayo put Foster's ex-wife and Dr. Mason, the psychiatrist, on the stand during the sentencing phase. Foster's ex-wife testified to Foster's disturbed emotional state and Dr. Mason bolstered her testimony with medical corroboration of Foster's illness. Also, Mayo introduced certain medical records into evidence, so that the jury had, during its deliberations, written evidence of Foster's emotional health.[6] In addition, the judge should have considered the pre-trial competency reports as part of the material adduced to support the existence of mitigating factors.

[4] Mayo's assessment of the Bay County, Florida, jury as more likely to respond to an appeal to emotion than to complicated medical proof, and his consequent presentation of the mitigating evidence in this manner, does not rise to the level of constitutionally ineffective assistance of counsel. The evidence Mayo in fact presented covered essentially the same subjects as that which petitioner would now have him present. Mayo's choice to present mitigating evidence in the manner he did was a strategic decision informed by years of criminal practice in the region. Mayo's assistance in this regard was not ineffective, nor did it work to petitioner's actual and substantial disadvantage. *Washington v. Strickland*, 693 F.2d at 1260.[7]

4. Mayo wisely made clear on the record his inability to convince Foster to proceed by what Mayo regarded as the best defense, by examining Foster out of the jury's presence immediately when Foster took the stand, as follows:

By Mr. Mayo:

Q. Your name is Charles Kenneth Foster?
A. Yes sir.
Q. Are you commonly called Kenny?
A. Yes sir.
Q. Kenny we are out of the presence of the jury and I have discussed this aspect with you, is that correct?
A. Yes sir.
Q. Prior to this time have you been advised that the three psychiatrists and the court has (sic) ruled that you are presently competent to stand trial and that you are competent to aid in the preparation of your defense?
A. Yes sir.
Q. Is it true that both counsel that are present in the court have discussed many times with you your various defenses?
A. Yes sir.
Q. And did we also discuss with you the possibility of the defense of insanity at the time of the crime, not presently, but at the time of the crime?
A. Yes sir.
Q. Did you direct us to prepare a defense other than that?
A. Yes, I did.
Q. Did we also discuss with you the possibility of a defense in which we would attempt to reduce the degree of the offense to second degree?
A. Yes sir.
Q. Did you advise your counsel to prepare a defense other than that?
A. Yes, I did.

Thus, Mayo clearly distanced himself from the theory by which he was compelled to conduct Foster's defense.

5. Included among the mitigating circumstances the jury should have considered were whether: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional stress." Fla.Stat.Ann. § 921.141(6)(b) (West Supp.1982); and "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Fla.Stat.Ann. § 921.141(6)(f) (West Supp.1982).

6. Mayo had prepared the jury during *voir dire* for the receipt of evidence of Foster's emotional illness by emphasizing how this information could justify a finding of "mercy."

7. In assessing whether counsel has provided effective assistance in the face of an allegation that he or she failed to investigate or present a particular line of defense, this Court has noted that:

III. WEIGHT OF AGGRAVATING VS. MITIGATING CIRCUMSTANCES

Petitioner alleges that the failure of the court to instruct the jury that any aggravating circumstances must outweigh the mitigating circumstances "beyond a reasonable doubt" for the jury to suggest the death penalty is a denial of due process. Petitioner reasons that the conclusion that aggravating circumstances outweigh any mitigating circumstances is a fact "necessary to constitute the crime of" capital murder and therefore is subject to the due process requirement of *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), and its progeny of proof beyond a reasonable doubt.

[5] This Court recently held that, under the Florida bifurcated death penalty trial which provides for guilt and penalty phases, the Florida sentencing determination is a separate proceeding dealing with facts that are not elements of the crime itself. *Ford v. Strickland*, 696 F.2d 804 at 817–19. Thus, a finding that the aggravating circumstances outweigh mitigating circumstances is not subject to the due process requirements of *In Re Winship*. The *Ford* court noted that the petitioner in that case seriously confused the proof of facts and the weighing of facts in sentencing. The court determined that the weighing process, "is not a fact susceptible of proof under any standard. . . ." *Id.*, at 818. The holding of the *Ford* court in this regard applies fully to petitioner's claim in the instant action.

An attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of his assumptions are reasonable. *Washington v. Strickland*, 693 F.2d at 1256. The court in *Washington v. Strickland* suggested several factors to employ in determining whether strategic choices based upon a set of assumptions are reasonable, including: the experience of the attorney; the consistency of the lines of defense pursued and not pursued; and the degree of possible prejudice that might foreseeably result from the strategic choice. *Id.* at 1248 n. 23. A consideration of these factors, as well as the concern that presentation of evidence of Foster's "crazy behavior" by using additional family or friends as witnesses could have led to the introduction of some very unsavory testimony concerning petitioner's past acts, leads to the conclusion that Mayo's strategy choice was prudent.

IV. THE *BROWN* ISSUE—NON-RECORD MATERIAL BEFORE THE REVIEWING COURT

Petitioner argues that the Florida Supreme Court relied on nonrecord information, such as psychiatric and pre-sentence investigation reports, in the direct review of his conviction and sentencing. Petitioner claims that this practice infringed on his constitutional guarantees including the right to due process of law, the effective assistance of counsel, confrontation, freedom from cruel and unusual punishment, and the protection against compelled self-incrimination.[8] He argues that the use of this material runs afoul of the principles of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (petitioner was denied due process when death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain).

[6] The *en banc* court in *Ford* denied an identical claim in that action. The *Ford* court relied upon the Florida Supreme Court's opinion in *Brown v. Wainwright*, 392 So.2d 1327, *cert. denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981),[9] to conclude that:

> Even if members of the [Florida Supreme C]ourt solicited the material with the thought that it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it was not used, and the

8. Petitioner alleges violations of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

9. *Brown v. Wainwright* was a direct petition for writ of habeas corpus by 123 Florida death row inmates alleging the same facts of the receipt of non-record materials during the pendency of their capital case appeals. The Florida Supreme Court denied class relief.

rejection of the notion that it affected the judgment of the court ends the matter when addressed at the constitutional level.

Ford v. Strickland, at 811. We therefore deny petitioner's *Brown* claim in the instant action.

V. THE *LOCKETT* ISSUE—INSTRUCTIONS ON MITIGATING CIRCUMSTANCES

Petitioner's final claim is that the trial judge's instructions precluded the jury from considering *non-statutory* mitigating circumstances, in violation of the holding of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The Supreme Court in *Lockett* held that the "Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604, 98 S.Ct. at 964–65 (footnote omitted) (emphasis in original).

During the sentencing phase, the trial judge instructed the jury, "The aggravating circumstances which you may consider are *limited* to such of the following as may be established by the evidence." The judge then read the statutory aggravating circumstances. He next instructed on the mitigating circumstances by stating, "[t]he mitigating circumstances which you may consider if established by the evidence are these." The judge then read the seven statutory mitigating circumstances. Foster contends that this instruction was insufficient to permit the jury reasonably to understand that they were entitled to consider non-statutory factors in mitigation of petitioner's sentence. Petitioner claims that he adduced evidence of several non-statutory mitigating factors, including: his willingness to cooperate with the police and to confess the crime; the effect of alcohol, due to his mental illness, on petitioner's ability to premeditate and possess the requisite intent to commit murder; and petitioner's need for psychiatric treatment. The State of Florida argues that consideration of this issue is barred under the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 954 (1977), due to Foster's failure to object at trial or to raise this issue on direct appeal.

The petitioner in *Ford* raised a similar *Lockett* claim. In *Ford*, the trial judge instructed the jury, "You shall consider only the following aggravating circumstances . . . ." and read the statutory language. With regard to mitigating circumstances, he said, "You shall consider the following . . . ," omitting the word "only" and reading the statutory mitigating circumstances. The *Ford* Court found that petitioner failed to meet the cause and prejudice exception to *Sykes*. The Court noted that petitioner's trial occurred two years before *Cooper v. State*, 336 So.2d 1133, 1139 n. 7 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), in which the Florida Supreme Court ruled explicitly that the jury could consider only statutory mitigating circumstances, and four years before *Lockett*, which provided a directly contrary resolution of the issue. Nonetheless, the *Ford* Court refrained from determining whether this constituted "cause" for petitioner's state procedural default because the Court found that petitioner failed to meet the *Sykes* prejudice prong. The Court determined that the challenged jury instructions did not rise to the level of "*actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982) (emphasis in original).

We note at the outset of our analysis that the proof of nonstatutory mitigating circumstances adduced by petitioner bears a striking resemblance to the statutory factors the jury indisputably could have considered. We thus treat all but one category of petitioner's adduced proof as encompassed within the statutory mitigating circumstances. Petitioner's proffered evidence of his willingness to confess and cooperate with the police is the only proof which raises the *Lockett* claim.

We are unable to conclude that Foster's *Lockett* claim is controlled entirely by the *Ford* decision. The *en banc* Court in *Ford* did not reach the merits of the constitutionality of the jury instructions under *Lockett*. Despite the fact that the instructions in *Ford* and the instant action are virtually identical, several features of petitioner's sentencing hearing militate against applying the *Sykes* bar to Foster's claim. First, the case for cause is similarly strong here as it is in *Ford*. Foster's trial occurred in 1975, one year before *Cooper* and three years before *Lockett*. It would be difficult to characterize the *Lockett* claim as "available" during petitioner's trial, as the Supreme Court recently required to support a finding of procedural default:

> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.

Engle v. Isaac, 456 U.S. 107, 134, 102 S.Ct. 1558, 1574–75, 71 L.Ed.2d 783 (1982).

The second reason for not applying the *Sykes* bar to Foster's claim rests on the *en banc* court's discussion of the trial judge's order in *Ford* that, "[T]here are no mitigating circumstances existing—either statutory or, otherwise—which outweigh any aggravating circumstances." The *en banc* Court interpreted this statement as weighing in favor of the conclusion that the jury did not perceive a restriction on the use of any mitigating evidence and that there was a total absence of such evidence. There was no such indication in the instant action. In addition, as we discuss *infra* at n. 13, petitioner adduced substantial evidence of *statutory* mitigating factors. Thus, *Ford* is not necessarily dispositive of our resolution of the prejudice issue here because of this factual distinction.

[7] While we conclude that the *Ford* decision does not prevent our examination of the merits of petitioner's *Lockett* claim, we find that Foster has failed to adduce sufficient facts to overcome the *Sykes* prejudice prong in order to establish a constitutional claim deserving of redress in this habeas action. The only mitigating factor petitioner proffered, which was not already contemplated by the statutory categories, concerns his willingness to confess and cooperate with the police. The record contains only scant evidence to support this claim. Foster called the police to turn himself in only after investigators had already discovered blood soaked clothes in his bathtub. We decline to regard petitioner's pretrial confession as a factor in mitigation of his crime because petitioner attempted to suppress this confession. Foster cannot in retrospect claim to have cooperated once he lost his confession motion. Similarly, petitioner waited until he was deeply enmeshed in perjured testimony before he confessed on the witness stand. The circumstances of his confession during trial therefore fairly negate any inference of petitioner's cooperativeness.

Because we are not persuaded that petitioner presented significant nonstatutory mitigating evidence that would justify our overturning the state court's factual findings to the contrary, especially in light of the presumption of correctness that attaches to these findings under 28 U.S.C. § 2254(d), we conclude that petitioner's *Lockett* claim is properly barred by the *Sykes* prejudice prong.

VI. TRIAL COURT'S FINDINGS OF FACT IN SUPPORT OF SENTENCE

[8] We hold that petitioner's sentence may not stand where the trial judge failed to follow the sentencing procedures required by the Florida Death Penalty Statute and the interpretory decisions of the Florida Supreme Court. The trial judge failed to set forth clearly in writing "its findings upon which the sentence of death is based as to the facts. . . ." Fla.Stat.Ann. § 921.141(3) (West Supp.1982).[10] This deficiency rises to the level of an error of

10. Florida Statute Annotated, Section 921.141(3) (West Supp.1982) provides:

> Notwithstanding the recommendation of the majority of the jury, the court, after

constitutional dimensions infecting petitioner's sentencing hearing, in light of the Supreme Court's recognition that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett*, 933 U.S. at 604, 98 S.Ct. at 2964, and that state procedural aspects of the death penalty proceedings consequently are subject to the requirements of the Due Process Clause.[11]

> weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it *shall set forth in writing its findings upon which the sentence of death is based as to the facts*: (a) that sufficient aggravating circumstances exist as enumerated in subsection (5), *and* (b) *that there are insufficient mitigating circumstances*, as enumerated in subsection (6), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported *by specific written findings of fact based upon circumstances in subsection (5) and (6)* and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment in accordance with S. 775.082.
>
> (Emphasis added).

11. The *Sykes* bar is inapplicable to this claim because petitioner did not engage in a procedural default. Foster could not have been expected to object to the form of the judge's findings of fact at trial because the findings apparently were entered in writing only after the conclusion of the proceedings. This claim arguably was encompassed within petitioner's assertions of error in his motion for a new trial. Foster clearly raised this claim on direct appeal, state collateral appeal, and in his federal habeas petition.

The Florida Supreme Court, on direct appeal, addressed this claim when it stated: "Although the findings of the trial judge in the case *sub judice* were not expansive, the justification of a sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment." 369 So.2d at 931-932. Thus, "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, the federal court implies no disrespect to the state by entertaining the claim." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 77 (1979) (footnote omitted). *See, e.g., Washington v. Watkins*, 655 F.2d 1346, 1368 (1981); *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 174 (1982); *Braxton v. Estelle*, 641 F.2d 392, 394 (5th Cir.1981); *Holloway v. McElroy*, 632 F.2d 605, 617 (5th Cir.1980), *cert. denied*, 453 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981). *Also see Henry v. Wainwright*, 686 F.2d 311, 313 (5th Cir. Unit B) ("If Florida law dealt with the merits of Henry's objection, whether or not there was a procedural default at trial under state law, then a federal habeas court must also determine the merits of the claim. *Lefkowitz v. Newsome*, 420 U.S. 283, 292 n. 9, 95 S.Ct. 886, 891 n. 9, 43 L.Ed.2d 196 (1975); *Ratcliff v. Estelle*, 597 F.2d 474, 478 (5th Cir.), *cert. denied*, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979)."), *petition for cert. filed*, No. 82-840 (Nov. 17, 1982).

The issue of inadequate findings of fact goes to the very heart of our ability to perform our judicial duties of review under the Constitution. In our review of the record, we have the benefit of briefs on this precise issue filed by Foster and the State in the district court. Moreover, we believe it is well within a reviewing court's discretion to consider fundamental constitutional deficiencies raised by a petitioner originally and not pursued on appeal. Courts have noted that, "[o]nce a timely appeal is taken from an order made appealable by a statute, some courts have viewed their power to be plenary to the extent they choose to exercise it. *See, e.g., Hurwitz v. Directors Guild of America, Inc.*, 2d Cir., 364 F.2d 67, *cert. denied*, 385 U.S. 971, 87 S.Ct. 508, 17 L.Ed.2d 435 (1966)." *Henry v. First National Bank of Clarksdale*, 444 F.2d 1300, 1305, n. 5 (5th Cir.1971). Other courts have indicated their willingness to reverse or modify judgments as applied to non-appealing parties, who obviously have not briefed the issues on appeal. *See Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 476 (8th Cir.1977) ("once a timely notice of appeal has been filed from a judgment, it gives us jurisdiction to review the entire judgment; rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require. *See Langnes v. Green*, 282 U.S. 531, 538, 51 S.Ct. 243 [246], 75 L.Ed. 520 (1931)....")

The trial judge, in the case at bar, made the following "findings upon which sentence of death is based:"

> The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in subsection (5) of section 921.141, Florida Statutes, that justify a sentence of death, and that *there are insufficient mitigating circumstances*, as enumerated in Subsection (6) of said Section 921.141, *to outweigh the*

aggravating circumstances. The aggravating circumstances found by the Court are as follows: 1. The murder of JULIAN FRANKLIN LANIER was committed while the defendant was engaged in the commission of a robbery. 2. That the capital felony was especially heinous and atrocious. (Emphasis added).

We are unable to determine whether the judge found no mitigating circumstances or if he found certain mitigating circumstances, which he merely failed to specify, and that these were insufficient to outweigh the aggravating circumstances. The Florida Supreme Court's statement on direct review, that "there were no mitigating circumstances to outweigh the aggravating circumstances," 369 So.2d at 931, is equally ambiguous. Moreover, the state in its Response to Foster's district court habeas petition, interprets these findings to mean that, "there were no mitigating factors to be found." If this interpretation is indeed correct, and absent any indication otherwise, it means that the findings of the trial court and the Florida Supreme Court on direct review were clearly and indisputably erroneous based upon the facts on the record.[12]

In *Hall v. State*, 381 So.2d 683 (Fla.1979), the trial judge had made findings of fact virtually identical to those in the instant case.[13] The Florida Supreme Court remanded these findings for clarification because the trial court failed to provide a "detailed statement of findings of fact delineating the aggravating and mitigating circumstances found to exist. . . ." *Id.* 381 So.2d at 684. The *Hall* court reasoned:

> This additional information is necessary to enable this court to properly review the death sentence in accordance with our pronouncement in *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), that: "In order to sustain a sentence of death following a jury recommendation of life, the findings suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. . . ."

Id. 381 So.2d at 684.[14] This same difficulty has now infected the five levels of review to which this case has been submitted.

The Supreme Court's continuing concern that sentencing discretion be directed and limited so that state procedures do not create a substantial risk that the death penalty will be imposed in an arbitrary and capricious manner[15] mandates our refusal to permit petitioner's sentence to stand based upon the trial court's inadequate factual findings. Moreover, the Supreme Court has unambiguously stated that the death penalty sentencing process must meet the requirements of the Due Process Clause:

> First, five members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this coun-

12. Petitioner adduced substantial evidence of his long history of psychiatric illness, including episodic psychosis and paranoid schizophrenia, drug and alcohol abuse and dependence, self-mutilation, and a lessened ability to perceive right from wrong. It is beyond peradventure that this proof amounts to support for a finding of mental mitigation, which would entitle a federal habeas court, as directed by 28 U.S.C. § 2254(d)(8), to disregard the "presumption of correctness" normally accorded state court factual findings.

13. The trial judge found:

> Not only does the Court find aggravating circumstances in that the capital felonies were committed while the defendant was engaged, or was an accomplice, in the commission of a rape, but further finds that the capital felonies were especially heinous, atrocious and cruel, and finds that there are insufficient mitigating circumstances as enumerated in section 921.141, Florida Statutes, to outweigh the aforesaid aggravating circumstances. . . .

Hall, 381 So.2d at 684.

14. While the Florida Supreme Court in both *Tedder* and *Hall* reviewed situations in which the jury recommended life imprisonment and the judge disregarded that recommendation by sentencing to death, the court's obligation to conduct an independent review is no less great when a trial judge accepts a jury's recommendation of death, nor are the requirements for findings of fact any less rigorous. Written findings are necessary "[n]otwithstanding the recommendation of a majority of the jury . . ." Fla.Stat.Ann. § 921.141(3) (West Supp.1982).

15. *Lockett*, 438 U.S. at 601, 98 S.Ct. at 2963, *quoting Gregg v. Georgia*, 428 U.S. 153, 188-89, 96 S.Ct. 2909, 2931-32, 49 L.Ed.2d 859 (1976).

try. *Gregg v. Georgia*, 428 U.S. 153, 181–188 [96 S.Ct. 2909, 2928–33, 49 L.Ed.2d 859] (Opinion of Stewart, Powell, and Stevens, JJ); see id., at 231–241 [96 S.Ct. at 2973–77] (Marshall, J., dissenting); *Furman v. Georgia*, 408 U.S., at 286–291 [92 S.Ct. at 2753] (Brennan, J., concurring), 306–310 [92 S.Ct. at 2760–63] (Stewart, J., concurring); see id., at 314–371 [92 S.Ct. at 2764–94] (Marshall, J., concurring). From the point of the view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Second, it is now clear that the sentencing process as well as the trial itself must satisfy the requirements of the due process clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Memps v. Rhay*, 389 U.S. 128 [88 S.Ct. 254, 19 L.Ed.2d 336]; *Specht v. Patterson*, 386 U.S. 605 [87 S.Ct. 1209, 18 L.Ed.2d 326]. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. *See Witherspoon v. Illinois*, 391 U.S. 510, 521–523 [88 S.Ct. 1770, 1776–78, 20 L.Ed.2d 776] (footnote omitted).

Gardner v. Florida, 430 U.S. 349, 357–58, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977).

These statements make clear that the penalty phase of petitioner's trial failed to comport with the requirements of the Constitution. "Without full disclosure of the basis for the death sentence, the Florida capital death sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*." *Gardner*, 430 U.S. at 361, 97 S.Ct. at 1206 (footnote omitted) (death sentence unconstitutional where court relied on confidential non-record sentence report). The trial judge's failure to set forth findings of fact upon which his decision to impose the death sentence was based violates the concern for consistency and objectivity in death penalty sentencing. Absent more detailed findings, as required under Florida law, we have no "meaningful basis for distinguishing the ... case in which [capital punishment] is imposed from ... the many cases in which it is not." *Gregg*, 428 U.S. at 188–89, 96 S.Ct. at 2931–32.[16]

16. We realize that our review of the imposition of a death penalty, under the scheme validated by the Supreme Court, presents unusual issues of federal-state comity. Cases involving capital sentencing are an exception to the general principle that the violation by a state of its own rule of criminal procedure generally is not cognizable on federal habeas corpus. *See e.g., Van Poyck v. Wainwright*, 566 F.2d 1083 (5th Cir.1978); *Blankenship v. Estelle*, 545 F.2d 510 (5th Cir.1977), *cert. denied* 444 U.S. 856, 100 S.Ct. 115, 62 L.Ed.2d 75 (1979); *Bell v. Estelle*, 525 F.2d 636 (5th Cir.1975); *Pringle v. Beto*, 424 F.2d 515 (5th Cir.1970). In capital cases it is precisely the clearly defined existence of and adherence to the state procedural rules that qualifies a sentencing determination as non-arbitrary and thus constitutionally permissible. The Supreme Court validated a specific procedural scheme when upholding the Florida death penalty statute in *Proffitt*. "[T]he limitations of the [Florida] statute make the death penalty constitutional. Ignoring these limitations implicates the Constitution." *Henry*, 661 F.2d at 60.

This Court recently recognized similar constitutional concerns inherent in state procedural shortcomings in a capital case. The Court in *Goode v. Wainwright* explained the significance of state procedural deficiencies to a federal habeas court as follows:

> In death penalty cases the constitutional dimensions of the Eighth Amendment's proscription of cruel and unusual punishment have significant procedural imperatives. This requires that we take as our starting point those procedures which the state has implemented to prevent the arbitrary imposition of the death penalty. *See Godfrey v. Georgia*, 446 U.S. [420] at 427–33, 100 S.Ct. [1759] at 1764–67 [64 L.Ed.2d 398 (1980)] (*Stewart, J., joined by Blackmun, Powell and Stevens, JJ.*). Implicit in a decision that a

When, as here, there is substantial evidence on the record that would have allowed the trial judge to impose a life sentence, and it is unclear whether the judge even considered this evidence in reaching his conclusion, we find a substantial "risk that the death penalty ... [was] imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S. at 605, 98 S.Ct. at 2965. We therefore reverse the district court's decision insofar as it upholds Foster's death sentence and remand for the district court to request the trial court to enter adequately detailed findings of fact, as required by the Florida Death Penalty statute.[17]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

RONEY, Circuit Judge, dissenting:

Although I concur with the result Judge Tuttle reaches on all other issues, I cannot concur in Section VI, Trial Court's Findings of Fact in Support of Sentence.

I respectfully dissent from the decision that the writ of habeas corpus could be granted because of perceived inadequacies in the findings of fact of the sentencing judge. Although the Florida Supreme Court determined that the findings were adequate for review purposes, *Foster v. State*, 369 So.2d 928, 931–32 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979), this Court reaches a contrary result by relying on *Hall v. State*, 381 So.2d 683, 684 (Fla.1978) (Order for Clarification), a case neither cited in Foster's briefs nor addressed by the state.

It strikes me that the Court here is raising to a constitutional level an issue that is largely a matter of state law. The extent to which a reviewing court will tolerate inadequate findings of a trial court generally depends upon the appellate court's willingness to review an entire record and take note of undisputed evidence. The sufficiency of findings is often a matter of discretionary judgment. I do not think the Florida Supreme Court's decision in this regard rises to a constitutional fault.

This Court is, in effect, reversing the Florida Supreme Court's decision that the findings were sufficient to enable that court to fulfill its review function. The Florida court acknowledged Foster's argument that he had committed the crime while under the influence of extreme mental or emotional disturbance, a statutory mitigating factor he claimed the trial court had not considered. The state court responded:

> Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar) and found that there were no mitigating circumstances sufficient to overcome the heinous nature of the homicide. The defendant committed the homicide in an effort to fulfill his inten-

> particular scheme will likely result in rational and consistent sentencing is the critical assumption that the state will *follow* that scheme. Thus, the failure to abide by that scheme can result in the arbitrary imposition of the death penalty in violation of the Eighth Amendment....

Goode v. Wainwright, 704 F.2d 593, 610, n. 19 (1983), (emphasis in original). Our approach to the review of Foster's contention on habeas appeal is bottomed in this same disdain for those state procedural inconsistencies which erode undeniable substantive federal constitutional rights.

We determine herein, quite simply, that the state has failed to follow the procedure found constitutional in *Proffitt*, and, in addition, that the trial court's reasons set forth on the record, as they now stand, are inadequate to support a reasoned judgment of capital punishment. We remand for further findings to avoid the very second-guessing of the sentencing jury and judge that the dissent finds objectionable.

17. If the original judge is no longer available, or if that judge's present recall of the facts upon which Foster's sentence of death is based proves inadequate to provide accurate and detailed findings, the trial court would need to conduct a new sentencing hearing. In that event, it is within the trial judge's discretion to decide whether the jury's penalty phase advisory verdict, based upon the facts adduced at the 1975 sentencing hearing, is sufficiently helpful to render a new verdict, or whether a new jury should be impanelled for those proceedings.

> tions and complete his desire, *i.e.*, "ripping the victim off." An elderly gentleman had agreed to go out and have some fun, but the price of such activity was his life. Defendant showed no compassion when he cut the victim's throat, beat him, dragged him into the woods, and cut his spine with a knife. As described by one witness, there was no air coming from the body of the victim after she heard "the cracking" of the spine.

Foster v. State, 369 So.2d at 931. Then, stating that the aggravating circumstances were proven beyond a reasonable doubt, the Florida court compared the facts of this case with those in the following similar Florida cases in which the death penalty had been imposed: *Sullivan v. State*, 303 So.2d 632 (Fla.1974), *cert. denied*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976); *Proffitt v. State*, 315 So.2d 461 (Fla.1975), *aff'd*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); and *Henry v. State*, 328 So.2d 430 (Fla.), *cert. denied*, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976), 444 U.S. 885, 100 S.Ct. 176, 62 L.Ed.2d 114 (1979). The state court then concluded:

> Although the findings of the trial judge in the case *sub judice* were not expansive, the justification of his sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment. This reasoned judgment comports with our consideration of other cases and the sentence of death was appropriate under the circumstances.

Foster v. State, 369 So.2d at 931–932.

I see no constitutional error in this determination. The evidence of "mitigation" was essentially undisputed. The weight to be given it was the issue. It is the state court's job, not ours, to weigh the aggravating circumstances against the mitigating circumstances, and make a reasoned decision. *Eddings v. Oklahoma*, 455 U.S. 104, 117, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). If a federal court determines that the state has followed the procedure found constitutional in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and that the record supports a reasoned judgment of capital punishment, the constitutional requirements are fulfilled, and it matters little that the federal court would have reached a different judgment, or would have required more of the trial court than the Florida Supreme Court has required. Foster has not argued that the death penalty in this case is infirm because of lack of proportionality or because the trial court could not hold the aggravating circumstances sufficient to outweigh the mitigating evidence. Based upon the facts and record in this case, Foster simply could not argue that the death penalty has been inflicted in an arbitrary and capricious manner.

To the extent that any argument suggests there might be clear error in the state court's failure to find certain non-statutory mitigating circumstances, it seems to me to head in the wrong direction. There are two kinds of mitigating evidence. First, under the Florida statute, evidence of certain specified circumstances must be considered mitigating. Although the weight to be given any such circumstance is for the sentencer, that it is mitigating is statutorily ordained. Second, under *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), the trier of fact must *not be precluded from considering*, as a mitigating factor, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." It is confusing, however, to suggest that the sentencer must necessarily view as mitigating any evidence offered by the defendant as a non-statutory mitigating circumstance. More than just weight is involved. The first question is whether it is mitigating at all. What may seem mitigating to one may seem neutral, or even aggravating, to another. That the defendant must be allowed to present and argue to the sentencer any relevant evidence he considers mitigating is an altogether different proposition from a proposal that the sentencer must consider the evidence mitigating simply because the defendant classifies it as such. For instance, if due process were violated anytime a sentencer failed to consider drug or alco-

hol addiction as mitigating, the United States Supreme Court could not have held the Florida statute constitutional, since that statute does not require the sentencer to consider drug and alcohol addiction as mitigating. Certainly, it is not the job of the federal court to second-guess the sentencing jury and judge as to what is, and what is not, a non-statutory mitigating circumstance as long as the defendant has been able to present evidence and argue the point.

I would affirm the denial of habeas corpus relief by the district court.

Charles Kenneth FOSTER, Petitioner,

v.

Charles G. STRICKLAND, Jr., et al., Respondents.

No. 81-5734.

United States Court of Appeals, Eleventh Circuit.

Nov. 3, 1983.

Appeal from the United States District Court for the Northern District of Florida.

ON PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 27, 1983, 11 Cir., 1983, 707 F.2d 1339).

Before RONEY and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Upon further consideration, we conclude that the failure of the appellant to raise the issue concerning "the trial court's findings of fact in support of its sentence" in its brief or in oral argument before us forecloses our consideration of the issue *sua sponte*. *Cf. Stephens v. Zant*, 716 F.2d 276 (5th Cir.1983), on remand from the Supreme Court of the United States.

That part of our opinion in this case beginning with VI and through the conclusion, together with the dissenting opinion, are hereby stricken and the following is substituted in lieu thereof:

THE JUDGMENT OF THE TRIAL COURT DENYING THE WRIT IS AFFIRMED.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
DEC 30 1983

NO. 81-5734

CHARLES KENNETH FOSTER,

Petitioner,

versus

CHARLES G. STRICKLAND, JR., et al.,

Respondents.

Appeal from the United States District Court for the Northern District of Florida

---

Before RONEY and KRAVITCH, Circuit Judges and TUTTLE, Senior Circuit Judge.

BY THE COURT:

IT IS ORDERED that petitioner's motion to reconsider this Court's order of November 3, 1983 is DENIED.

IT IS FURTHER ORDERED that the clerk is directed to file the petition for rehearing of petitioner-appellant and that this petition is OVERRULED.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Charles Kenneth FOSTER, Appellant,

v.

STATE of Florida, Appellee.

No. 48380.

Supreme Court of Florida.

Feb. 22, 1979.

Rehearing Denied May 10, 1979.

The Circuit Court, Bay County, Mercer P. Spear, J., convicted defendant of first-degree murder and of robbery and imposed death sentence, and defendant appealed. The Supreme Court, Adkins, J., held that: (1) trial court did not commit reversible error in allowing removal for cause of prospective jurors who stated that they could not and would not return verdict of guilty if penalty might result in death; (2) trial court did not err in admitting into evidence gruesome and offensive photographs; (3) death penalty statute was constitutional, and (4) aggravating circumstances supporting death penalty were proved beyond a reasonable doubt.

Affirmed.

1. Jury ⇐108

Person who has beliefs which preclude him from finding defendant guilty of an offense punishable by death is not qualified as a juror in a capital case. West's F.S.A. § 913.13.

2. Criminal Law ⇐1166.16

In murder prosecution, trial court did not commit reversible error in allowing removal for cause of prospective jurors who indicated that they could not and would not return verdict of guilty if penalty might result in death. West's F.S.A. § 913.13.

3. Criminal Law ⇐438(7)

In murder prosecution, trial court did not err in admitting into evidence gruesome and offensive photographs, even though there was no question as to identity of victim and cause of death.

4. Stipulations ⇐14(10)

A defendant cannot, by stipulating as to identity of homicide victim and cause of death, relieve State of its burden of proof beyond reasonable doubt.

5. Criminal Law ⇐1206(1)

Death penalty statute is constitutional. West's F.S.A. § 921.141(5).

6. Homicide ⇐354

In murder prosecution, aggravating circumstances supporting death penalty were proved beyond reasonable doubt. West's F.S.A. § 921.141(5).

7. Homicide ⇐354

When one or more of aggravating circumstances is found, death is presumed to be proper sentence unless it or they are overridden by one or more of the mitigating circumstances; all evidence of mitigating circumstances may be considered by judge or jury. West's F.S.A. § 921.141(5).

Louis G. Carres, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death. He was also adjudged guilty of robbery and sentenced to life imprisonment.

Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and

the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger.

The girls, after a discussion, agreed to go the the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a deserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.

Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so defendant took a knife and cut the victim's spine.

The girls and defendant then drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.

The next morning Anita Rogers went to the Sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of age and was not charged with any offense in this case.

Defendant was charged by an indictment with the offenses of first-degree murder and robbery.

The defendant testified and, during his description of the events of the evening, testified as follows:

> I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.

The jury returned verdicts finding defendant guilty of robbery, premeditated murder in the first degree, and felony murder. After the sentence hearing, the jury returned an advisory verdict unanimously recommending that defendant receive the death penalty. The court then proceeded to sentence defendant to death on the murder charge and to life imprisonment on the robbery charge.

Defendant says error was committed when the trial court excused certain prospective jurors because of their conscientious objection to the death penalty, relying upon the following principle enunciated in *Witherspoon v. Illinois*, 391 U.S. 510, 521-23, 88 S.Ct. 1770, 1776-7, 20 L.Ed.2d 776 (1968):

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

The decisions of this Court have been in accord with the holding in the *Witherspoon* case, *supra*. *See Campbell v. State*, 227 So.2d 873 (Fla.1969); *Paramore v. State*, 229 So.2d 855 (Fla.1969).

[1] A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death is not qualified as a juror in a capital case. Section 913.13, Florida Statutes (1975).

[2] The voir dire examination discloses that Joe C. Smith could not and would not return a verdict of guilty if the penalty might result in death. A similar situation existed as to prospective juror John Douglas Hunt. The prospective juror Deloris Swearington was not as adamant as the others, but she was challenged peremptorily and not for cause. Only two jurors were

challenged for cause over objections of defendant because of their beliefs against the death penalty. Similar objections were found to be without merit in *Campbell v. State, supra; Williams v. State*, 228 So.2d 377 (Fla.1969); *Perkins v. State*, 228 So.2d 382 (Fla.1969); *Paramore v. State, supra;* and *Portee v. State*, 253 So.2d 866 (Fla. 1971). The lower court did not commit reversible error in allowing the removal for cause of these prospective jurors. We might add that the defendant, in his testimony, made the following statements:

> Well, if the judge will accept my plea of guilty and *guarantee I will be electrocuted for taking this man's life, that's what I want.* I got this robbery charge, you know, we didn't rob that man.
>
> Anybody knows you can't take nobody's life and *that's why I want to die for it.* I mean I ain't crazy. I don't know if I got demons in me or not, but I believe I do. I went to church Sunday night to get them taken out. [Emphasis added.]

[3] Defendant also complains that gruesome and inflammatory photographs were admitted into evidence, saying that they were unduly prejudicial. Defendant argues that there was no question as to the identity of the victim or the cause and manner of his death, so the photographs served no evidentiary purpose.

The photographs were indeed gruesome and offensive. However, they met the guidelines set by this Court in *Bauldree v. State*, 284 So.2d 196, 197 (Fla.1973):

> In *State v. Wright*, 265 So.2d 361 (Fla. 1972), we commented on and stated the proper test as follows:
>
> ". . . Appellant interprets the *Young* case [*Young v. State*, 234 So.2d 341 (Fla.1970)] as holding that 'necessity' rather than 'relevancy' is the test for admissibility of gruesome photographs. 'Necessity' may be a consideration where, as in *Young*, large numbers of cumulative photographs of a gruesome nature taken away from the scene of the crime, are offered into evidence. But relevancy remains the basic test, as stated in *Young:* [5. Id. at 347]
>
> 'The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs, particularly in large numbers must have same [sic] relevancy, either independently or as corroborative of other evidence.'
>
> "Thus, the current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of 'whether cumulative,' or 'whether photographed away from the scene,' are routine issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence."

[4] A defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt.

One photograph was introduced during the penalty phase of the proceeding to show that the death blow was delivered with such tremendous impact that it went through the victim's spinal column and severed the victim's spinal cord. This was evidence of the atrocious manner in which the victim was murdered and the deliberate, cold-blooded intent of the defendant.

[5] Defendant contends that the death penalty statute is unconstitutional. He recognizes that the statute was upheld in *State v. Dixon*, 283 So.2d 1 (Fla.1973), and *Alford v. State*, 307 So.2d 433 (Fla.1975), but requests that we reexamine our prior decision. He argues that the statute does not meet constitutional muster because of the discretion of the state attorney in making the charge, as well as the discretion of the state attorney to plea bargain. He also refers to the discretion of the jury to convict a defendant of a homicide less than capital and thereby spare defendant's life. He also refers to the discretion involved in

grants of executive clemency. All of these objections have been considered by this Court, as well as the Supreme Court of the United States. The Florida death penalty statute is constitutional. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

At the sentence hearing the defendant produced Dr. John F. Mason, a psychiatrist, who testified as to the mental and emotional condition of the defendant. The defendant also produced his former wife who testified concerning the mental and emotional instability of the defendant. The jury recommended that the death sentence be imposed. The trial judge found that the murder was committed while defendant was engaged in the commission of a robbery and that the capital felony was especially heinous and atrocious. He found that sufficient aggravating circumstances existed as enumerated in Section 921.141(5), Florida Statutes (1975), that justified a sentence of death. He found that there were no mitigating circumstances to outweigh the aggravating circumstances. There was no presentence report filed in the case or considered by the trial judge.

Defendant contends that the felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and the trial court did not consider this mitigating factor. The following instruction was given to the jury before they deliberated upon the penalty:

> If one or more aggravating circumstances are established you should consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusions as to the sentence which should be imposed.

Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar) and found that there were no mitigating circumstances sufficient to overcome the heinous nature of the homicide. The defendant committed the homicide in an effort to fulfill his intentions and complete his desire, *i. e.*, "ripping the victim off." An elderly gentleman had agreed to go out and have some fun, but the price of such activity was his life. Defendant showed no compassion when he cut the victim's throat, beat him, dragged him into the woods, and cut his spine with a knife. As described by one witness, there was no air coming from the body of the victim after she heard "the cracking" of the spine.

[6, 7] The aggravating circumstances were proved beyond a reasonable doubt. As stated in *State v. Dixon*, 283 So.2d at 9,

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

In *Sullivan v. State*, 303 So.2d 632 (Fla. 1974), the sentence of death was appropriate where defendant and an accomplice conducted an assistant manager of a restaurant to a swampy area, fully intending to murder such victim, and where the 25-year-old defendant with no prior criminal record shot the victim with both barrels of a shotgun in the back of the head.

The death sentence was appropriate when a murder was committed while the defendant was engaged in the burglary of the deceased's home. This murder was found to be especially heinous, atrocious, and cruel, and the jury recommended the death penalty. The defendant had been previously convicted of burglary (this differs from defendant Foster), but the atrocious nature of the crime coupled with the burglary were other aggravating circumstances sufficient to warrant the death penalty. *Proffitt v. State*, 315 So.2d 461 (Fla.1975), *aff'd*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Where defendant had a lengthy history of violence (just as defendant Foster), had demonstrated callous indifference to human life, and where his acts were for pecuniary gain, the death penalty was properly imposed. *Henry v. State*, 328 So.2d 430 (Fla. 1976).

Although the findings of the trial judge in the case *sub judice* were not expansive,

the justification of his sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment. This reasoned judgment comports with our consideration of other cases and the sentence of death was appropriate under the circumstances.

Other questions raised by defendant have been considered and are without merit.

The judgments and sentences of the trial court are affirmed.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

Charles Kenneth FOSTER, Appellant,

v.

STATE of Florida, Appellee.

No. 60636.

Supreme Court of Florida.

May 28, 1981.

Defendant, who had been convicted of first-degree murder and robbery and sentenced to death on murder charge and life imprisonment on robbery charge, filed motion for postconviction relief and stay of execution. The Circuit Court, Bay County, Larry A. Bodiford, J., denied motion for postconviction relief without evidentiary hearing and denied application for stay of execution. Defendant appealed and filed motion for stay in Supreme Court. The Supreme Court, Adkins, J., held that: (1) record established that defendant was competent to stand trial, and (2) evidence was sufficient to find that trial attorney had provided reasonably effective assistance of counsel to defendant at trial.

Affirmed; motion for stay denied.

McDonald, J., dissented and filed opinion.

England, J., dissented.

1. Criminal Law ⇐998(19)

Even though it may appear, upon examination, that motion for postconviction relief is sufficient, it should be summarily denied if files and records in case conclusively refute allegations or otherwise conclusively preclude relief. 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850.

2. Criminal Law ⇐354
Homicide ⇐270

Matters relating to competency of defendant at murder trial did not constitute relevant evidence of insanity which could be introduced during guilt phase of trial and would not require submission of insanity issue to jury.

3. Criminal Law ⇐625

Record on appeal from conviction for first-degree murder and robbery showed that defendant was competent to stand trial.

4. Criminal Law ⇐1144

A conviction is presumed to be valid.

5. Criminal Law ⇐998(16)

When claim of ineffective assistance of counsel is asserted, burden is on person seeking collateral relief to specifically allege and establish grounds for relief and to establish whether these grounds resulted in prejudice to that person.

6. Criminal Law ⇐998(17)

On motion for postconviction relief, evidence was sufficient to find that trial attorney provided reasonably effective assistance of counsel to defendant.

7. Criminal Law ⇐998(5)

Motion to vacate under rules of criminal procedure must be directed to judgment and sentence of trial court; therefore, defendant's claims that motion for postconviction relief should be granted because Supreme Court allegedly reviewed material, in connection with his prior appeal, which was unknown to defendant, was not proper ground for postconviction motion. 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850.

8. Criminal Law ⇐998(3, 13)

Issues raised and disposed of on direct appeal, as well as those issues which could have and should have been raised on direct appeal, are not proper subject matter for postconviction motion. 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850.

Richard H. Burr, III, Nashville, Tenn., and Stephen L. Seliger, Florida Clearinghouse on Criminal Justice, Tallahassee, Florida, for appellant.

Jim Smith, Atty. Gen., and Gregory C. Smith, Asst. Atty. Gen., Tallahassee, Florida, for appellee.

ADKINS, Justice.

This is an appeal from an order denying Charles Kenneth Foster's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Appellant requested an evidentiary hearing on his motion and a stay of execution pending disposition thereof. The trial judge denied the motion for post-conviction relief without an evidentiary hearing and denied the application for stay of execution. Foster has also filed a motion for stay of execution in this Court.

After reviewing the record and hearing oral argument, we deny the motion for stay of execution and affirm the order of the trial judge denying the motion for post-conviction relief without an evidentiary hearing.

The appellant was convicted of murder in the first degree and robbery on October 4, 1975, and sentenced to death upon the conviction for murder in the first degree. He was also sentenced to life imprisonment upon conviction for robbery. Upon appeal, this Court affirmed both of appellant's convictions and sentences on February 22, 1979, and denied rehearing on May 10, 1979. *Foster v. State*, 369 So.2d 928 (Fla.1979). On October 1, 1979, appellant's petition for certiorari was denied by the Supreme Court of the United States. On May 5, 1981, the governor of the state of Florida signed a death warrant for appellant requiring his

execution on June 3, 1981. On May 12, 1981, the motion for post-conviction relief was filed in the trial court.

Appellant has argued that there are two issues which require evidentiary hearing: the ineffective assistance of counsel and the claim that appellant was incompetent during the course of the trial. Appellant says that counsel was ineffective in that he failed to investigate medical records which were readily available and failed to investigate the existence of expert witnesses who could testify as to appellant's mental incompetency. Appellant also argued that his attorney advised him improperly about the consequences of a plea of not guilty by reason of insanity in that his counsel advised him that he would spend the rest of his life in the "nuthouse" if this defense should prevail. Appellant also argues that his counsel should have noticed the incompetency of the appellant at the trial. He alleges that he was taking a prescription drug, valium, during the trial and this drug made him incompetent. Appellant also argues that he was, in fact, incompetent during trial and this was an additional reason for an evidentiary hearing.

[1] Even though it may appear, upon an examination, that a motion for post-conviction relief is sufficient, it should be summarily denied if the files and records in the case conclusively refute the allegations or otherwise conclusively preclude relief. *Lawson v. State*, 231 So.2d 205 (Fla.1970); *State v. Reynolds*, 238 So.2d 598 (Fla.1970).

[2, 3] It appears from the face of the motion that the matters relating to the competency of the appellant did not constitute relevant evidence of insanity which could be introduced during the guilt phase of the trial. This evidence would not require the submission of the insanity issue to the jury. *See Grisson v. State*, 237 So.2d 57 (Fla. 3d DCA 1970); *Campbell v. State*, 227 So.2d 873 (Fla.1969); *Dampier v. State*, 180 So.2d 183 (Fla. 1st DCA 1965). The trial judge found appellant competent to stand trial and observed his conduct during the trial. The record conclusively shows that this assertion of incompetency during the trial is without merit.

The record discloses the following dialogue out of the presence of the jury when appellant was called as a witness:

BY MR. MAYO:

Q. Your name is Charles Kenneth Foster?

A. Yes sir.

Q. Are you commonly called Kenny?

A. Yes sir.

Q. Kenny, we are out of the presence of the jury and I have discussed this aspect with you, it that correct?

A. Yes sir.

Q. Prior to this time have you been advised that the three psychiatrists and the Court has ruled that you are presently competent to stand trial and that you are competent to aid in the preparation of your defense?

A. Yes sir.

Q. Is it true that both counsel that are present in the court have discussed many times with you your various defenses?

A. Yes sir.

Q. And did we also discuss with you the possibility of the defense of insanity at the time of the crime, not presently, but at the time of the crime?

A. Yes sir.

Q. Did you direct us to prepare a defense other than that?

A. Yes, I did.

Q. Did we also discuss with you the possibility of a defense in which we would attempt to reduce the degree of the offense to second degree?

A. Yes sir.

Q. Did you advise your counsel to prepare a defense other than that?

A. Yes, I did.

Q. Is it your desire to take the stand in the presence of the jury and give your version of the alleged offense?

Appellant, during his subsequent testimony, confessed his guilt from the witness stand. At that moment his counsel requested a recess and requested the court to determine

the sanity or competency of the appellant at that time as well as his sanity at the time of the murder.

During the penalty phase counsel effectively introduced evidence of appellant's past psychiatric treatment through the testimony of his wife. One psychiatrist was called, but appellant now complains that the interrogation of the psychiatrist was faulty. Appellant says counsel should have focused the examination toward a psychiatric evaluation by the doctor. This was a matter of judgment, and we cannot fault the attorney for presenting evidence in "lay language" through the wife's testimony instead of "doctor language" through the doctor's testimony.

Defense counsel, during the penalty phase, introduced into evidence the written report of Committee Finding Incompetency and a petition for involuntary hospitalization and hospitalization certificate containing a diagnosis in each instance. By following this tactic, the attorney gave the jury the opportunity of reading a written exhibit instead of attempting to remember technical oral testimony.

The trial court properly instructed the jury that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" was a mitigating factor. Also, before sentencing appellant, the trial judge considered three psychiatric reports which had been prepared on the question of appellant's competency to stand trial. Appellant's counsel, in closing argument, stressed this mitigating factor. In our opinion he handled this problem as a professional advocate and should not be faulted.

[4, 5] A conviction is presumed to be valid. Therefore, when ineffective assistance of counsel is asserted, the burden is on the person seeking collateral relief to specifically allege and establish the grounds for relief and to establish whether these grounds resulted in prejudice to that person. *Meeks v. State*, 382 So.2d 673, 675 (Fla.1980). The appellant has failed to carry this burden.

[6] Applying the standards set forth in *Knight v. State*, 394 So.2d 997 (Fla.1981), we find that the trial attorney has provided reasonably effective assistance of counsel to Foster.

[7] Appellant claims that the motion for post-conviction relief should be granted because this Court allegedly reviewed material, in connection with the appeal, which was unknown to appellant. This is not a ground which is contemplated as proper for post-conviction motion. Florida Rule of Criminal Procedure 3.850 authorizes the use of this procedure by a prisoner claiming the right to be released on the ground that the judgment was entered or that sentence was imposed in violation of the constitution or laws of the United States or of the state of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack. In other words, the motion to vacate under Florida Rule of Criminal Procedure 3.850 must be directed to the judgment and sentence of the trial court. Under no interpretation of this rule can any action of the Florida Supreme Court be reviewed. Furthermore, treating the claim as a petition for writ of habeas corpus, this issue was settled in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981).

[8] The appellant has presented other issues which were raised on direct appeal, or could have been raised on direct appeal. It is well settled that issues raised and disposed of on direct appeal, as well as those issues which could have and should have been raised on direct appeal, are not the proper subject matter for a post-conviction motion. *Witt v. State*, 387 So.2d 922 (Fla.) *cert. denied*, — U.S. —, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980); *Spinkelink v. State*, 350 So.2d 85 (Fla.) *cert. denied*, 434 U.S. 960, 98 S.Ct. 492, 54 L.Ed.2d 320 (1977); *State v. Matera*, 266 So.2d 661 (Fla. 1972).

We therefore affirm the order of the trial judge denying the motion for post-conviction relief and deny appellant's motion for stay of execution.

No petition for rehearing will be entertained.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON and ALDERMAN, JJ., concur.

McDonald, J., dissents with an opinion.

ENGLAND, J., dissents.

McDONALD, Justice, dissenting.

I would grant a stay of execution and direct the trial judge to afford the defendant an opportunity to present evidence that the jury and the trial judge were insufficiently apprised of the "mental mitigating factors" set forth in section 921.141(6).*

In *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973), we stated that

> [m]ental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

This distinction is fine, but one goes to the guilt while the other may affect the sentence. While I am satisfied that the record clearly demonstrates that there was no error in the handling of the guilt phase of Foster's trial, when it comes to the sentencing phase, the picture becomes sufficiently blurred to require an evidentiary hearing under the formula set forth in *Meeks v. State*, 382 So.2d 673 (Fla.1980), as modified by *Knight v. State*, 394 So.2d 997 (Fla.1981).

* The legislature has provided three "mental mitigating factors" in § 921.141(6).

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

sion to allow the judge to decide defendant's competency upon the basis of psychiatric reports did not constitute ineffective assistance of counsel; (3) defense counsel's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and an appeal to mercy was reasonable; (4) defense counsel's strategy of emphasizing to the jury that a life recommendation would mean at least 25 years' imprisonment without parole for defendant did not constitute ineffective assistance of counsel; and (5) the trial court's action in excluding a juror was constitutionally justified due to juror's objections to the death penalty.

Petition denied.

Charles Kenneth FOSTER, Petitioner,

v.

Charles G. STRICKLAND, Jr., et al., Respondents.

No. TCA 81-0847.

United States District Court, N. D. Florida, Tallahassee Division.

July 2, 1981.

Defendant brought a habeas corpus petition challenging the legitimacy of his convictions for first-degree murder and robbery, his confinement, and the death sentence. The District Court, Higby, J., held that: (1) defense counsel was not ineffective on basis that he did not adequately investigate and present psychiatric defenses for defendant; (2) defense counsel's decision to allow the judge to decide defendant's competency upon the basis of psychiatric reports did not constitute ineffective assistance of counsel; (3) defense counsel's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and an appeal to mercy was reasonable; (4) defense counsel's strategy of emphasizing to the jury that a life recommendation would mean at least 25 years' imprisonment without parole for defendant did not constitute ineffective assistance of counsel; and (5) the trial court's action in excluding a juror was constitutionally justified due to juror's objections to the death penalty.

Petition denied.

1. Criminal Law ⇐641.13(2)

In prosecution for murder in which defendant was sentenced to death, defense counsel was not ineffective on ground of failure to adequately investigate psychiatric defenses, in that the record showed that the investigation of possible psychiatric defenses was more than adequate. U.S.C.A.Const. Amends. 5, 14; 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850.

2. Criminal Law ⇐641.13(5)

In murder prosecution in which defendant was sentenced to death, defense counsel was not ineffective for allowing judge to decide defendant's competency upon the basis of reports by court-appointed psychiatrists, nor on ground that counsel ineffectively raised competency to stand trial issue when defendant confessed. U.S.C.A.Const. Amends. 5, 14; 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850.

3. Criminal Law ⇐641.13(6)

In murder prosecution in which defendant was sentenced to death, defense counsel was not ineffective for failing to present an insanity defense where after properly advis-

7. That was not the case in *Universal Gypsum*, where the two actions were commenced simultaneously. Thus, this is an even stronger candidate for a stay of federal proceedings than was *Universal Gypsum*.

8. *See generally* H. Friendly, *Federal Jurisdiction: A General View* 139-52 (1973) (sharply questioning the need for diversity jurisdiction except in isolated circumstances).

ing defendant and trying to convince him to seek a conviction of the lesser included offense, second-degree murder, or to plead not guilty by reason of insanity, defendant insisted on not following counsel's advice. 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850; U.S.C.A.Const. Amends. 5, 14.

4. Criminal Law ⇐641.13(6)

In prosecution for murder in which defendant was sentenced to death, in light of the law and evidence available, defense counsel's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony and an appeal to mercy was reasonable and did not constitute ineffective assistance of counsel. 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850; U.S.C.A.Const. Amends. 5, 14; West's F.S.A. § 921.141(1-6).

5. Criminal Law ⇐641.13(2)

In prosecution for murder in which defendant was sentenced to death, strategy of defense counsel in emphasizing to jury that a life sentence recommendation would mean at least 25 years' imprisonment without parole for defendant was not ineffective assistance of counsel on basis that a limiting instruction telling the jury that 25 years was the minimum time defendant would serve should have been requested. 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850; U.S.C.A.Const. Amends. 5, 14.

6. Criminal Law ⇐641.13(6)

In murder prosecution in which defendant was sentenced to death, defense counsel's failure during sentencing phase to object to cross-examination questions eliciting testimony about defendant cutting one person and knifing his father and then leaving him in a ditch, and counsel's failure during sentencing phase to request a limiting instruction telling jury to disregard references to defendant's criminal record did not amount to ineffective assistance of counsel. 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.850; U.S.C.A.Const. Amends. 5, 14; West's F.S.A. § 921.141(1).

7. Habeas Corpus ⇐45.2(4)

Review by district court in proceeding on defendant's habeas corpus petition of state trial court's determination that defendant was competent to stand trial was foreclosed by *Wainwright v. Sykes*, which forbids federal review of a state court decision based upon independent state grounds.

8. Criminal Law ⇐517.2(2)

In prosecution for murder and robbery, defendant's confession was not obtained through violating his right to counsel and was admissible where defendant initiated the statement.

9. Jury ⇐108

In prosecution for first-degree murder and robbery, trial court's action in excluding a juror was constitutionally justified where juror said he would never vote for a death sentence or for guilt if conviction could result in a death sentence.

10. Habeas Corpus ⇐45.2(4)

Where defendant's contention that instruction on statutory mitigating factors pursuant to Florida's capital punishment statute was improper was not raised at trial, it was barred by *Wainwright v. Sykes* in proceeding on defendant's habeas corpus petition. West's F.S.A. § 921.141(1-6).

11. Habeas Corpus ⇐25.1(4)

Defendant's allegations that Florida Supreme Court secretly obtained and reviewed psychiatric and/or investigative reports concerning him during its consideration of his appeal from his death sentence did not state a claim for relief in defendant's habeas corpus petition, in that Supreme Court's function as a reviewer rather than sentencer made its consideration of such documents irrelevant. 28 U.S.C.A. § 2254(d).

Steven L. Seliger, Tallahassee, Fla., Richard H. Burr, III, Southern Prisoners Defense Committee, Nashville, Tenn., for petitioner.

Gregory C. Smith, Asst. Atty. Gen., Tallahassee, Fla., for respondents.

MEMORANDUM OPINION DENYING PETITION FOR WRIT OF HABEAS CORPUS

HIGBY, District Judge.

Charles Kenneth Foster challenges the legitimacy of his convictions for first degree murder and robbery, confinement, and death sentence in his habeas corpus petition. On May 26, 1981, when Foster filed his petition, he was scheduled for electrocution June 3, 1981. I stayed his execution because Foster was entitled to and had not received an evidentiary hearing on at least one of his claims, the competency of his trial counsel. June 18, 1981, I held an evidentiary hearing on the issues raised by the petition. In a pre-hearing memorandum and at the hearing Foster's lawyer, with commendable candor and realism, abandoned three of his issues. The abandoned three are: (1) the challenge to the reasonable doubt jury instruction in the guilt phase; (2) the challenge to jury consideration of the felony-murder aggravating circumstance; and (3) the challenge to the jury venire's composition. The remaining issues fall into two categories, one evidentiary issue and strict legal issues, and will be discussed under those headings. I first summarize the bare facts surrounding Foster's conviction to place the various claims in perspective. I will then address each remaining issue.

SUMMARY

There was little doubt from the beginning that early in the morning of July 15, 1975, Foster killed Julian Lanier. Foster and Lanier met the evening before in Tot's Bar where they got acquainted over a few drinks. At Lanier's suggestion Foster agreed to find some women who would hire out for recreational sex. They traveled in Lanier's camper to the Bay Shore Bar where Foster, with Lanier's financial backing, found two women who agreed to their proposition. The foursome drove to a secluded place to party. There the party ended. Foster beat Lanier bloody and then, after talking to him briefly, slit his throat. While Foster and the women were covering Lanier with leaves and branches, Lanier made sounds of life which inspired Foster to slice his cervical spine.

Foster was arrested, given a first appearance, and appointed counsel on July 15, 1975, the day of the murder (P. Ex. 17). Five days later Foster gave a detailed confession to Bay County Sheriff's Office Investigator Joe Coram. A motion to suppress (P. Ex. 11) that statement, submitted on stipulated facts, was denied (P. Ex. 1-D, p. 458). After Foster's counsel filed a Suggestion of Insanity (P. Ex. 14), the court appointed three psychiatrists to examine Foster. The matter of Foster's competency to stand trial was submitted to the court on the basis of the psychiatrists' report (P. Ex. 18). The court found Foster competent to stand trial on September 25, 1975 (P. Ex. 14).

October 1, 1975, through October 4, 1975, Foster was tried by jury. The jury found him guilty and recommended the death sentence. Judge Spear sentenced Foster to death, and the Florida Supreme Court affirmed the conviction and sentence. *Foster v. State*, 369 So.2d 928 (Fla.1979). The United States Supreme Court denied Foster's petition for certiorari October 1, 1979. Governor Graham signed Foster's death warrant on May 5, 1981. Foster sought a new trial and sentencing proceeding in Florida courts on May 12, 1981, under Florida Rule of Criminal Procedure 3.850. The court denied his 3.850 motion. The Florida Supreme Court affirmed that denial. *Foster v. State*, 400 So.2d 1 (1981). Shortly afterwards, on May 29, 1981, I stayed Foster's execution. *Foster v. Strickland, Jr.*, — F.Supp. ——.

THE EVIDENTIARY ISSUE

One of Foster's habeas issues requires an evidentiary determination. It is his claim of ineffective assistance of counsel.

Ineffective Representation

Foster alleges six instances of ineffective representation: (1) failure to investigate and raise an insanity defense and to present

mitigating psychiatric evidence during the trial's sentencing phase; (2) failure to raise Foster's alleged incompetency at trial; (3) mentioning the parole considerations of a life sentence without requesting an appropriate limiting instruction; (4) failure to request an instruction telling the jury to disregard evidence of Foster's criminal past; (5) failure to object to the questions which elicited the testimony about earlier crimes; (6) failure to challenge the jury venire's composition. This last claim I assume included in Foster's abandonment of his challenge in this proceeding to the jury venire, particularly since no evidence was presented on the subject. The others will be individually addressed.

The United States Constitution's guarantee of due process includes a guarantee of effective assistance of counsel. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (recognizing the right in certain capital cases); *Brooks v. Texas*, 381 F.2d 619, 624 (5th Cir. 1967), (footnote omitted), ("An indigent defendant is entitled to the effective assistance of counsel").

> Effective counsel does not mean 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance.' *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). This necessarily 'involves an inquiry into the actual performance of counsel in conducting the defense . . . based on the totality of the circumstances and the entire record.' *United States v. Gray*, 565 F.2d 881, 887 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978).

Beavers v. Balkcom, 636 F.2d 114, 115 (5th Cir. 1981).

The Lawyer's Qualifications

The reasonable likelihood of Foster's lawyer, Virgil Mayo, rendering effective assistance cannot seriously be questioned. In 1975 Virgil Mayo had been a member of The Florida Bar for 24 years. All of that time except for about eight months of 1952 was spent as a practicing lawyer. Mayo had been Public Defender of Florida's Fourteenth Judicial Circuit since 1963, the year the legislature created the position. He had tried hundreds of cases. Although Foster is the only defendant tried for a capital offense Mayo has represented since the current death penalty statute was enacted, he represented several capital defendants charged under Florida's earlier law. His record is impressive. Two clients got jury verdicts of acquittal. One got a binding jury recommendation of mercy. The fourth's trial ended in a mistrial and was later plea-bargained out as a manslaughter case. Mayo's experience included more than twelve cases involving psychiatric defenses. He also served three years on the Panhandle Mental Health Board.

This recital of Mayo's experience describes only cases in which he was lead counsel. His experience is more extensive. As Public Defender he has served as an advisor and overseer in hundreds of cases. In addition Mayo was assisted at Foster's trial by a new assistant public defender, Bill Wager. Wager's qualifications and actions during Foster's trial have not been questioned. And I know from having observed Wager in action many times that he is an intelligent, dedicated, innovative, highly competent criminal defense attorney. These facts show Foster was represented by experienced, competent counsel.

Investigation of Psychiatric Defenses

[1] Foster's allegations of ineffectiveness, however, focus not upon his lawyer's qualifications but his conduct. Mayo, Foster claims, did not render reasonably effective assistance. Eight specific actions are claimed to show ineffectiveness. One of the most major is the claim that Mayo did not adequately investigate and present psychiatric defenses for Foster.

Mayo officially took over Foster's case from an assistant on September 10, 1975 (P. Ex. 1-A), although he was aware the case would be his at least a week earlier. Mayo's investigation was thorough. He reviewed the reports of the three appointed

psychiatrists. In addition, he reviewed extensive medical records from the Bay County Memorial Hospital (P. Ex. 7), Florida State Hospital (P. Ex. 8), and the Bay County Guidance Clinic (P. Ex. 9). Mayo held at least ten conferences with Foster. His assistant, Wager, met with Foster five additional times. Mayo talked to Foster's mother. To all this Mayo added a valuable personal resource, his long-time residence in the area, his extensive family ties, and his knowledge of Foster.

"An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir. 1979). Mayo's primary alleged investigative failing was not obtaining the medical records. The facts show he did. Foster also alleges Mayo did not talk to an important lay witness, his mother. Again the facts show he did. Mayo did not talk with Foster's siblings. Much of their testimony at the hearing revealed Foster's unsavory history of self-mutilation, rape, alcohol abuse, drug abuse, a fondness for knife fighting, and beating his family members. Mayo was aware of much of this, especially Foster's reputation with a knife, through his community contacts. Most of this information was also in the medical records Mayo reviewed. In short, the facts revealed at the hearing show Mayo's investigation unearthed almost all the information Foster claims Mayo failed to investigate. Foster has not proven his claims of ineffective investigation. Mayo's investigation of possible psychiatric defenses was more than adequate.

Presentation of Psychiatric Defenses

Competency to Stand Trial

[2] Before trial Mayo questioned Foster's competency to stand trial. Three court-appointed psychiatrists examined Foster. All three found Foster competent to stand trial (P. Ex. 4–A). Two of the doctors had treated Foster before. One, Dr. Sapoznikoff, had treated Foster three times; once in 1972, once in 1973, and once in 1974. He was well informed about Foster's medical history, including his hospitalization in the Bay County Memorial and Florida State Hospitals as well as at the Bay County Guidance Clinic. Mayo allowed the judge to decide Foster's competency upon the basis of those reports. That decision is challenged as ineffective.

Foster argues and his experts testified that Mayo should have asked for a hearing and put the psychiatrists on the stand. Mayo did not ask for a hearing because he felt it would be useless. From his experience he believed that most psychiatrists, including these three all of whom he was familiar with, would not change their opinion once it was down in writing. My 15 years of trial experience cause me to agree with Mayo's evaluation of the situation. Over the years I examined a large number of psychiatrists. Once in a while a psychiatrist might vacillate from a written opinion, but I have never seen one retract an opinion. Mayo's submission of the competency issue was a realistic, effective decision.

During the trial Foster took the stand. While he began by recounting a version of the murder blaming the women, he ended confessing:

> I believe that she is the one that killed the man because—fuck it, I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.

(P. Ex. 1–D, pp. 510, 511). Immediately after Foster's dramatic confession Mayo moved for a continuance and for additional psychiatric examinations (P. Ex. 1–D, p. 512). The motion was denied (P. Ex. 1–D, p. 516).

During the trial Foster was taking a mild sedative, Valium. His dosage was ten milligrams three times a day. He took the first dose noon the first day of trial and as

prescribed afterwards. Mayo was not aware of this at trial, but Foster informed him of it through a letter to Wager shortly after the trial.

Foster argues Mayo ineffectively raised the competency to stand trial issue when Foster confessed. His focus is on Mayo's failure to notice during trial or raise post-trial Foster's use of Valium. One alleged fact Foster relies on I find did not exist. Foster claims he slept through much of the trial. I find he did not, although he may have laid his head on the table momentarily once or twice.

Perhaps Mayo should have filed a motion for new trial alleging incompetence at trial and informing the court of Foster's Valium use. It would, however, have been a motion destined for denial. Foster had been treated with and seriously abusing much stronger drugs. In fact 30 milligrams a day was the smallest Valium dosage prescribed for Foster in his years of medical treatment. That dosage would have had no effect on Foster, a chronically nervous person, except to relax him a bit. The fact that he had been without Valium at least a month before trial is insignificant. Since Valium is a long-lasting, cumulative drug, his abstinence actually lessened the Valium's effect compared to what it would have been if he had been taking it for some time before the trial. I find Mayo effectively questioned Foster's competency at trial.

The Insanity Defense

[3] Foster claims Mayo's failure to present an insanity defense was ineffective. The decision to not present the insanity defense was Foster's, not Mayo's. In Mayo's opinion the best defense strategies available were seeking a conviction of the lesser included offense, second degree murder, or pleading not guilty by reason of insanity. He explained his strategies and reasoning to Foster. He particularly favored seeking a second degree conviction. His theory was sound. Second degree murder included

> The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual ....

§ 782.04(2), Fla.Stat. (1975). The maximum punishment was 30 years' imprisonment. § 775.082(3)(b), Fla.Stat. (1975). Mayo believed that with the psychiatric evidence available, some rather bizarre behavior by Foster before and during the murder, and the circumstances (especially the fact that the victim died while drinking and using a prostitute) he could convince the jury to return a second degree verdict.

Foster rejected the defense. He wanted to "walk or burn." Despite his many arrests Foster had never been convicted, and he was convinced he could talk his way out of jail. It will be my word against the womens' was his reasoning. Mayo pointed out the fallacy of Foster's plan. Two eyewitnesses, he said, would be hard to counter, and Foster's confession would be devastating despite Foster's explanation that the women had just convinced him he killed Lanier. Mayo tried many times to change Foster's mind. But Foster was adamant—"Walk or Burn."

Foster rejected an insanity defense for the same reasons. As with the second degree murder strategy, Mayo explained the defense and its consequences. He accurately informed Foster that a not guilty by reason of insanity verdict might lead to some time in a mental hospital. A person acquitted for cause of insanity could treated as insane and incarcerated "[i]f the discharge or going at large of such ... person shall be considered by the court manifestly dangerous to the peace and safety of the people ...." Fla.R.Crim.P. 3.460 (1975). Given Foster's long history of violence and the brutality of the murder it was highly likely that if acquitted by reason of insanity, he would be confined for a good while in a mental hospital. This possibility of confinement caused Foster to reject an insanity defense.

"Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of

his case are cornerstones of effective assistance of counsel." *Gaines v. Hopper*, 575 F.2d 1147, 1149–1150 (5th Cir. 1978). Informed evaluation of potential defenses and a meaningful discussion of the case's realities are what Mayo gave Foster. Foster insisted on not following Mayo's advice. After properly advising Foster and trying to convince him to follow the advice, Mayo had no choice but to honor Foster's wishes and forego the insanity defense and forego seeking a second degree conviction.

Psychiatric Evidence in the Sentencing Phase

[4] Foster's final major challenge to Mayo's effectiveness questions Mayo's performance in the trial's sentencing phase. Florida's capital punishment statute creates a two-step proceeding. In step one, the guilt phase, the jury determines a defendant's guilt or innocence of the capital felony. If the defendant is convicted of a capital felony, the judge conducts a separate sentencing proceeding, the sentencing phase to determine whether death should be imposed. § 921.141(1), Fla.Stat. (1975). The proceeding is held before a jury which renders an advisory sentence. Eight aggravating and seven mitigating circumstances must be considered. §§ 921.141(2), (5), (6), Fla.Stat. (1975). The judge then considers the jury recommendation, weighs the aggravating and mitigating circumstances, and imposes sentence. § 921.141(3), Fla. Stat. (1975). "In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) [sic] [aggravating circumstances] and (7) [sic] [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." § 921.141(3), Fla.Stat. (1975). The conviction and death sentence are automatically reviewed by the Florida Supreme Court. § 921.141(4), Fla.Stat. (1975).

> Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.

Fla.R.App.P. 6.16(b) (1975). *See*, Boyd and Logue, *Developments in the Application of Florida's Capital Felony Sentencing Law*, 34 U.Miami L.Rev. 441 (1980), for a thorough review of Florida's death sentence statute.

Foster thinks Mayo was ineffective in the sentencing phase because he did not adequately present two mitigating circumstances: (1) "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance", section 921.141(6)(b), Florida Statutes (1975), and (2) "The capacity of the defendant to appreciate the criminality of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired", section 921.141(6)(f), Florida Statutes (1975).

Mayo presented evidence relevant to these factors. He specifically focused upon only one factor, extreme mental or emotional disturbance. He felt the psychiatric mitigating circumstances would be difficult for an unsophisticated Bay County jury to understand and likely to be ignored as technicalities by a jury outraged by the murder's brutality. Consequently he focused upon seeking mercy. To that end he put Foster's ex-wife on the stand. He felt she would evoke the jury's sympathy while presenting evidence from which he could also argue the psychiatric mitigating factors. She testified about Foster's self-mutilation and suicidal urges and the apparent lack of reason for his actions. Her testimony, albeit on cross-examination, was moving.

> He is a very sick person and I have begged for help for him and so has his mother and we could not get any help from nobody. They would rather put him in the electric chair and kill him than send him to an institution where he can get help. He has been to the mental health unit on a whole lot of occasions and they let him out and they give him pills to calm his nerves and the Judge won't do anything. He promised that he would. I have talked to Dr. Mason and

he promised he would and I talked to Dr. Cluxton and he promised he would. And Everybody at the Bay County Sheriff's Department knows me and any time I have ever had any occasion to talk to any of them, asking them to do something for him and nobody will. And they still won't because it's much easier to just go ahead and electrocute him and get it over with so they don't have to worry about somebody whose mind is bad. If he had T.B. or anything they would put him in an institution and they would help him where he couldn't hurt anybody but just because his mind is bad people don't understand that. They think it's all right just to go ahead and get him out of society. But why didn't they get him out of society before a crime like this had to be committed.

(P. Ex. 1-E, pp. 625–626).

Mayo also put Dr. Mason, one of the examining psychiatrists, on the stand. Through Mason the jury learned Foster had received psychiatric treatment four times since 1968, that he had been diagnosed paranoid, and was suicidally depressed. Records of a 1970 proceeding to determine Foster's competency were also introduced.

From the evidence introduced Mayo argued for a life recommendation. His argument actually began during voir dire where he asked several jurors whether they would consider mental or emotional disturbance as a mitigating factor in sentencing (P. Ex. 1-B, pp. 131, 133–135, 149). One prospective juror spontaneously mentioned mental disorders during voir dire (P. Ex. 1-B, p. 175). This indicates all the jurors, not just the ones questioned, realized a mental or emotional disturbance was important in sentencing. In any event the jury which unanimously recommended Foster's death included five jurors Mayo had questioned on the subject (P. Ex. 1-B, pp. 133–135; P. Ex. 1-E, pp. 653–654). During voir dire Mayo also emphasized mercy to the jury (P. Ex. 1-B, pp. 130, 132–136, 149–151, 163, 174, 182, 186, 195). The jury was instructed upon all mitigating circumstances (P. Ex. 1-E, pp. 648–649).

Building upon voir dire, the evidence, and the instructions Mayo argued for mercy emphasizing the mental or emotional disturbance mitigating factor as a reason to recommend life (P. Ex. 1-E, pp. 636–639). His use of Foster's ex-wife's testimony was particularly persuasive. He argued:

> You know, I would like to almost join that girl that was on that stand in crying out; in crying out as much money as we spend. And it's a shame that I live in a society that thousands and thousands and thousands and literally millions of dollars that are spent that we don't—that we don't know much about the mind. You know the reasons that officials haven't done anything I guess, we are treating minds about like the Indians treated boils with some wet moss. We are not even to the stage of treating the mind to where we can lance a boil, much less have penicillin. We know less about the mind than anything else. Yet in our ignorant society the State askes [sic] you to kill a person.
>
> That little girl cried out. She cried out if you are sick with tuberculosis, if you are sick with tuberculosis we treat it and we do. In my generation we have learned how to treat this. And I don't believe that forever we will continue to treat the mind by putting wet moss on it. I think that we are on the threshold of treating the human mind. And I think the reason for twenty-five years of holding a person in this thing with somebody that was compassionate and somebody says well during this period of time, you know, laws could be amended but if we are going to keep them there and I am asking for the life. I am asking for each of you to recommend to this Court that this life be saved because mitigating and extenuating circumstances exist.

(P. Ex. 1-E, pp. 638–639).

A lawyer's effectiveness is evaluated "on the totality of the circumstances and the entire record." *United States v. Gray*, 565 F.2d 881 (5th Cir. 1978), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978). In Foster's case the totality of the

circumstances included a new statute. Florida's death penalty law was enacted in 1972. Ch. 72-724, § 9, Laws of Fla. When Mayo tried the case there were only ten Florida Supreme Court opinions interpreting the death penalty law. *Alvord v. State*, 322 So.2d 533 (Fla.1975); *Swan v. State*, 322 So.2d 485 (Fla.1975); *Slater v. State*, 316 So.2d 539 (Fla.1975); *Proffitt v. State*, 315 So.2d 461 (Fla.1975); *Sawyer v. State*, 313 So.2d 680 (Fla.1975); *Gardner v. State*, 313 So.2d 675 (Fla.1975); *Spinkellink v. State*, 313 So.2d 666 (Fla.1975); *Taylor v. State*, 294 So.2d 648 (Fla.1974); *Lee v. State*, 294 So.2d 305 (Fla.1974); *State v. Dixon*, 283 So.2d 1 (Fla.1973). None of them interpreted the mitigating circumstances. One thing was clear. Jury recommendations of life were very important. *See, Swan v. State*, 322 So.2d 485 (Fla.1975); *Taylor v. State*, 294 So.2d 648 (Fla.1974). Supreme court review was in light of the facts, and the jury found the facts. *Alvord v. State*, 322 So.2d 533 (Fla.1975).

Important evidentiary considerations were also involved. If Mayo introduced Foster's medical history and testimony of his relatives as Foster says he should have, a great deal of highly prejudicial evidence would have come along. The jury would have learned that Foster once took his mother's car from her at knifepoint; that he raped two women, one of whom was his sister-in-law; that he had been arrested a number of times for violent crimes; and that he once told his mother he was going to kill his little brother and cook him for supper.

In light of the law, or lack of it, and the evidence available, Mayo's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and a good old-fashioned appeal to mercy was reasonable. After considering Mayo's handling of the sentencing phase, I cannot conclude it was ineffective. Another lawyer may have done it differently. Another lawyer may have done it better. Another lawyer may have done it worse. But Mayo was not ineffective.

Parole Considerations

[5] From voir dire through closing argument Mayo emphasized to the jury that a life recommendation would mean at least 25 years' imprisonment without parole for Foster. This should not have been done, Foster claims, without a limiting instruction telling the jury that 25 years was the minimum time he would serve. Mentioning parole without a limiting instruction, according to Foster, invited the jury to recommend death in order to prevent him mistakenly being paroled later. However, "[a]dmittedly, Petitioner's [Foster's] former counsel [Mayo] may well have brought the issue of parole before the jury in order to impress upon the jury the severity of a life sentence in Florida ...." Petitioner's Prehearing Memorandum of Law, Doc. No. 18, p. 18, *Foster v. Strickland*, TCA 81-0847 (U.S.D.Ct.N.D.Fla. June 12, 1981). More plainly put, Mayo's reference to 25 years without parole would discourage the jury from recommending death to avoid early parole. The strategy was well chosen. It may have been better implemented with the addition of a limiting instruction. But it is effective counsel, not perfect counsel Foster is entitled to, and the strategy, as implemented, was effective.

References to Foster's Criminal Record

[6] This issue has two parts. One is Mayo's failure to object to cross-examination questions eliciting testimony about Foster cutting one person and knifing his father and then leaving him in a ditch. The second is Mayo's failure to request a limiting instruction telling the jury to disregard references to Foster's criminal record. Under the existing law Mayo would have been justified in thinking the evidence was admissible. The statute provided for consideration of "any matter that the court deems relevant to sentence" and admission of any "evidence which the court deems to have probative value ... regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." § 921.141(1), Fla.Stat. (1975). Just

two weeks before Foster's trial the supreme court interpreted section 921.141(1) broadly.

> There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence.

Alvord v. State, 322 So.2d 533, 539 (Fla. 1975).

Again, ideally Mayo should have objected to the questions and asked for a limiting instruction. But his failure to do so does not amount to ineffectiveness. This claim highlights the "Catch 22" nature of the ineffectiveness claims. The evidence Foster says Mayo should have objected to is included in the medical records and family member testimony Foster says Mayo should have introduced.

THE NON-EVIDENTIARY ISSUES

The remaining issues raised in Foster's petition may be disposed of as a matter of law. Each will be addressed.

Incompetency at Trial

[7] Foster's position on his incompetency at trial was summarized in the evaluation of his ineffective assistance of counsel claim. Review of the state trial court's determination that Foster was competent to stand trial is foreclosed by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). That decision forbids federal review of a state court decision based upon independent state grounds. Here the independent state ground foreclosing review is abandonment on appeal. Mayo raised and preserved the issue of Foster's competency at trial. The issue was not raised in his appeal to the Florida Supreme Court and was therefore abandoned, as it should have been. Appellant's Initial Brief, *Foster v. State*, Fla.S.Ct. Case No. 40,280 (filed May 7, 1976) (hereinafter cited App.Int. B.).

Admissibility of Foster's Confession

[8] Foster claims his confession was obtained through violating his right to counsel and should not have been admitted. The issue was raised at trial on stipulated facts and abandoned, as it should have been, on appeal. App.Int.B. *Wainwright v. Sykes, supra*, forecloses review. In addition the factual findings implicit in the trial judge's ruling, which under Title 28, United States Code, Section 2254(d), are binding on me, support denying the motion because Foster initiated the statement. *Edwards v. Arizona*, — U.S. —, 101 S.Ct. 1880, 68 L.Ed.2d — (1981).

Evidence Constitutionally Insufficient to Prove Robbery

The record supports the state court's factual determination that Foster committed robbery. *See, Foster v. State*, 369 So.2d 928 (Fla.1979).

Impartial Jury Denied by Exclusion of Juror Smith

[9] The trial court removed Joe Smith from the jury panel because of his objections to the death penalty. Smith said he would never vote for a death sentence or for guilt if the conviction could result in a death sentence (P. Ex. 1-B, pp. 23-25). His statements amounted to "compelling prejudice against the death penalty" or near "resolve to vote against it blindly and in all circumstances" which constitutionally justify a court excluding a juror. *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979).

Trial Court Mishandling Evidence in Penalty Phase

This argument challenges the admission during the sentencing phase of graphic pictures of the deceased and the court not instructing the jury, on its own motion, to disregard references to Foster's criminal record. The contention is meritless.

"Heinous, Atrocious, and Cruel" Jury Instruction

One aggravating circumstance set forth in Florida's death penalty law and used to justify Foster's death sentence is "[t]he capital felony was especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla.Stat. (1975). This provision was part of Florida's statute

when the United States Supreme Court considered and approved it in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Foster claims it is unconstitutionally vague. *Proffitt* mandates rejection of this claim.

Mitigating Circumstances Jury Charge

[10] Foster's jury was told:

> Should you find one or more of these aggravating circumstances to exist it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(P. Ex. 1-E, p. 648). The statutory mitigating factors were listed next. Then the judge instructed:

> If one or more aggravating circumstances are established you should consider all the evidence tending to establish one or more, mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusions as to the sentence which should be imposed.

(P. Ex. 1-E, p. 650).

Foster argues these instructions are impermissible under the holding in *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973, 990 (1978) (footnotes omitted), that "the sentencer, in all but the rarest kind of capital case, [must] not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." This issue was not raised at trial, and is, therefore, barred by *Wainwright v. Sykes*, *supra*. Also, Florida's law is not like Ohio's, which required a death sentence unless one of three circumstances were proven. Florida's law allows the sentencer to consider and weigh mitigating circumstances as it sees fit.

Findings of Fact by Jury and Judge Justifying Death Sentence

Foster argues that the Constitution requires written findings from judge and jury specifying the mitigating and aggravating circumstances found and considered. Foster was sentenced to death in a procedure approved by the Supreme Court. *Proffitt v. Florida*, *supra*. Also, *Wainwright v. Sykes*, *supra*, bars this claim since it was not raised at trial.

Florida Supreme Court's Review of Post-Sentencing Psychiatric and Investigative Reports

[11] Foster has alleged the Florida Supreme Court secretly obtained and reviewed psychiatric and/or investigative reports concerning him during its consideration of his appeal. He was one of several prisoners who petitioned the Florida Supreme Court for relief on that ground. The court held a claim for relief had not been stated because its function as a reviewer rather than sentencer made its consideration of such documents irrelevant. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981). A petition for certiorari is pending before the United States Supreme Court. *Brown v. Wainwright*, *cert. pending*, U.S.S.Ct. No. 80,6434 (April 3, 1981). I adopt the reasoning of the Florida Supreme Court and hold Foster's allegations do not state a claim for relief.

Florida's Death Penalty is Applied in an Arbitrary and Unconstitutional Manner

This contention merely argues that all the other alleged errors make Foster's death sentence irrational and arbitrary. It is meritless.

SOME FINAL MATTERS

Foster's Counsel

At some point Foster may decide to challenge the effectiveness of his counsel in this proceeding, Richard H. Burr, III. In anticipation of that possibility, I record my observations on Burr's effectiveness. Burr has done a good job. His pleadings have been well written and thorough. The memo he filed was well researched, well written, and quite helpful. Burr clearly took pains to present the law accurately and forthrightly abandoned claims he found unsupportable.

In court he was an effective examiner and a gentleman. This decision simply applies the law to the facts. It is no reflection upon his abilities.

Delay

In argument on the Motion for Stay the State complained vociferously of Foster's alleged delay in bringing this petition. Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Court provides for dismissal of delayed petitions. The State never moved for dismissal under this rule. If its complaints were well founded, a motion should have been made. If the complaints were not well founded, they should not have been made. The comments made at the hearing insinuated Burr or Foster deliberately waited as long as possible to file the petition in order to delay Foster's execution. Such charges about Burr are insults to a capable lawyer, obviously working with a handful of other lawyers to represent the hundreds of people sentenced to death, probably at great personal sacrifice. Such charges about Foster are ludicrous. To imagine a semi-literate indigent plotting his federal litigation strategy is hard. Blame for the delay in this case is more fairly placed upon the Florida Supreme Court which took two years and five months to decide Foster's appeal and the State of Florida which does not provide indigents sentenced to death lawyers for their collateral litigation.

JUDGMENT

Foster's Petition for Habeas Corpus is denied. The stay in this case is vacated.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5734

CHARLES KENNETH FOSTER,

Petitioner-Appellant,

-v-

CHARLES G. STRICKLAND, Jr., Warden, Florida State Penitentiary; LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation; and JIM SMITH, Attorney General, State of Florida,

Respondents-Appellees.

On Appeal from the United States District Court
For the Northern District of Florida
Tallahassee Division

PETITION FOR REHEARING

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PETITION FOR REHEARING[1]

STATEMENT OF THE ISSUES

1. Whether the Court has misapprehended and erroneously decided Mr. Foster's claim of ineffective assistance of counsel at his sentencing trial because of a critical misunderstanding of the record.

2. Whether the Court has misapplied the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977) to its analysis of Mr. Foster's claim that the sentencing instructions violated Lockett v. Ohio, 438 U.S. 586 (1978).

ARGUMENT

I. THE COURT HAS MISAPPREHENDED AND ERRONEOUSLY DECIDED MR. FOSTER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING TRIAL -- SOLELY BECAUSE OF A CRITICAL MISUNDERSTANDING OF THE RECORD

Mr. Foster argued on his appeal to this Court that he was deprived of the effective assistance of counsel at his capital sentencing trial because of counsel's failure to present evidence of his long-diagnosed history of psychosis and of his lessened ability, as a result of this illness, to distinguish between right and wrong. Brief for Petitioner-Appellant ("Pet.Br."), 28-38. The Court correctly understood this claim.[2] Inexplicably, however, the Court read the record as not supporting the claim. Erroneously, the Court found that "[t]he evidence ... presented [in the sentencing trial] covered essentially the same subjects as that which petitioner would now have [defense counsel] present." Id. This reading of the trial record is, as demonstrated herein, plainly and fundamentally wrong, for the trial record contains absolutely no evidence that Mr.

---

1 Petitioner Charles Kenneth Foster has filed this petition because of the Court's order of November 3, 1983 striking that portion of its opinion of June 27, 1983 (reported at 707 F.2d 1339) which reversed the district court's order denying the writ of habeas corpus. Because Mr. Foster obtained the relief he sought on June 27, 1983, he had no cause for requesting rehearing after that opinion. Since the relief he sought and obtained on June 27 was taken back on November 3, however, he now has standing to petition for rehearing.

2 "Thus, petitioner claims, the jury and the judge did not have before them crucial evidence supporting several mitigating circumstances." Foster v. Strickland, supra, 707 F.2d at 1344 (footnote omitted).

Foster suffered from a serious, previously-diagnosed mental illness, or that this illness impaired his capacity to such an extent that the law would forgive (at least as to sentence) his commission of a homicide. Nonetheless because of this reading, the Court construed Mr. Foster's claim as quibbling over form rather than legitimately complaining over substance: "Mayo's [defense counsel's] choice to present mitigating evidence in the manner he did was a strategic decision ..." that was not ineffective. Id. at 1344 (emphasis supplied). Accordingly, Mr. Foster requests that the Court re-examine exactly what evidence was available to the jury and the judge for their consideration in his sentencing trial, and thereafter, to re-examine its analysis of the ineffective assistance claim.

The evidence which the Court believed to have been presented was summarized as follows:

> Mayo put Foster's ex-wife and Dr. Mason, the psychiatrist, on the stand during the sentencing phase. Foster's ex-wife testified to Foster's disturbed emotional state and Dr. Mason bolstered her testimony with medical corroboration of Foster's illness. Also, Mayo introduced certain medical records into evidence, so that the jury had, during its deliberations, written evidence of Foster's emotional health. In addition, the judge should have considered the pre-trial competency reports as part of the material adduced to support the existence of mitigating factors.

Id. at 1344 (footnote omitted). Although the Court did not describe in this part of its opinion the content of the foregoing "evidence,"[3] in its subsequent discussion of the trial judge's findings of fact concerning mitigation (in that part of the opinion stricken when the Court summarily reversed itself on rehearing by the state), the Court described it as follows:

> Petitioner adduced substantial evidence of his long history of psychiatric illness, including episodic psychosis and paranoid schizophrenia, drug and alcohol abuse and dependence, self-multilation, and a lessened ability to perceive right from wrong.

Id. at 1349 n. 12.

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[3] The evidence is referred to as "evidence," because, as Mr. Foster will soon demonstrate, half of the "evidence" was not presented and therefore not in evidence and available for consideration.

A comparison of what the Court thought was in evidence with what was in evidence, however, confirms the Court's critical misapprehension of the record.

The evidence presented at Mr. Foster's sentencing trial consisted entirely of the following: (a) the testimony of two witnesses, Mr. Foster's former wife, Frances Foster, and Dr. John Mason; and (b) two composite documents identified by Dr. Mason. Ms. Foster testified about "abnormalities in [Mr. Foster's] behavior" which she described as the following:

> Well, he cuts himself all the time and he has cut all the arteries in his arms and he has cut the heel strain in two and he has burnt steel wool on his leg. Just all kinds of things. The only reasons he doesn't kill hisself [sic] is because he thinks that that is the one crime that he cannot be forgiven for.

(Trial Transcript, hereafter "T," 623) Although Ms. Foster thereafter made an impassioned plea not to kill Mr. Foster because he was a "very sick person" (T. 625-626), she provided no more details of his sickness.

Dr. Mason testified that he was a psychiatrist and that he had seen Mr. Foster on "at least four" occasions, two of which were "in the hospital setting." (T. 615-616) He then was asked to identify two documents pertaining to two involuntary commitment proceedings against Mr. Foster and was asked simply to read from these papers what his diagnosis had been on each occasion. He responded that on November 19, 1970 (defendant's exhibit one), his diagnosis was "paranoid reaction" (T. 616), and on the second commitment [defendant's exhibit two, which was later identified to be in 1974 (T. 620)], his diagnosis was "suicidal depression with over dose of medication and self mutalative [sic] behavior" (T. 617). Dr. Mason's testimony concluded[4] with a series of questions which began with his observation that he had examined Mr. Foster and "ma[de] a report to the Court" subsequent to the homicide herein. Then he was asked to assume that Mr. Foster had consumed "four or more beers" on the day of the homicide, and on this basis was asked if he could provide his "opinion as to how

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4 No additional insight into Mr. Foster's mental state was elicited on cross-examination or redirect examination (T. 619-621).

long Kenny Foster could retain a premeditation for one thought" (T. 617). Dr. Mason responded,

> Not when the question is phrased quite that way. Certainly I would feel that from past experience Mr. Foster has very poor control when intoxicated and certainly intoxication would effect [sic] his ability to maintain a thought or to maintain a plan or carry it through. But as to estimate exactly how long he would be able to do so I don't think I could really do that.

(T. 617-618).

The involuntary commitment documents identified by Dr. Mason, which were also admitted into evidence (T. 614), provided no more insight into the nature or legal consequences of Mr. Foster's illness than did Dr. Mason's testimony. However, the absence of these documents from the record before this Court may well explain why the Court has misunderstood the scope of the evidence presented at Mr. Foster's sentencing trial. These documents, designated "Defendant's Exhibits" one and two at Mr. Foster's sentencing trial (T. 614), were not included in the copy of the trial record filed in the district court proceedings. Nor are the documents included in the copy of the trial record obtained by current counsel for Mr. Foster or in the copy of the record in the possession of the attorney general.[5] Nonetheless, counsel can represent to the Court that these documents added nothing to the testimony of Ms. Foster or Dr. Mason, for counsel has located what appear to be accurate indicia of the content of these exhibits.

Counsel has obtained from Mr. Mayo's files a set of involuntary commitment papers that appear to correspond to Defendant's Exhibit Two. This document is an eight-page compilation of legal, not medical, forms, only one page of which contains any medical information. That information is in its entirety, the following:

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[5] Upon further investigation, counsel has learned that these documents were sent to the Florida Supreme Court during the pendency of the direct appeal sometime after the record on appeal had been composed and filed. To date, however, personnel of the Supreme Court clerk's office have been unable to locate the documents.

> overdose of medication, self-mutilative behavior [the very language read by Dr. Mason at trial] ....
>
> near-lethal suicide attempt; drug abuse; self-mutilation; hostile, combative behavior [the opinion of a second psychiatrist] ....

Counsel has not been able to locate a copy of Defendant's Exhibit One (the 1970 commitment papers). However, in the records obtained from Florida State Hospital in connection with Mr. Foster's collateral proceedings,[6] which is the hospital to which the commitment was made in 1970, the following reference to the 1970 commitment papers is made:

> Commitment papers state: "that he is incompetent by reason of paranoid reaction; that the said incompetent is now a resident of Bay County and has been a resident of the State of Florida for a period of life; that his incompetency is acute and chronic, the particular hallucinations being nil; that his propensities are delusional thinking; that his age is 23; that the said incompetent Charles Kenneth Foster does require mechanical restraint to prevent him from self-injury or violence to others and that he is indigent or destitute and is eligible to be committed as such".

While this reference thus contains somewhat more than the "paranoid reaction" diagnosis testified to by Dr. Mason (T. 616), even that additional reference -- to "delusional thinking" and to the need for "mechanical restraint" of Mr. Foster --when combined with the notation apparently made in Defendant's Exhibit Two, supra, by no means provided the evidentiary basis for this Court's conclusion that Mr. Mayo had adduced "substantial evidence of [Mr. Foster's] long history of psychiatric illness, including episodic psychosis and schizophrenia," 707 F.2d at 1349 n. 12.[7]

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6 These records were introduced at the evidentiary hearing in the district court as Petitioner's Exhibit 8.

7 What may have led the Court astray from the sentencing trial record, however, is the absence of these exhibits from the record before it. Because these exhibits were absent, the Court may have mistakenly believed that these exhibits were the same as the medical records maintained by Bay County Memorial Hospital and Florida State Hospital with respect to Mr. Foster. These medical records were not presented at trial, but they were presented at the evidentiary hearing in the district court as Petitioner's Exhibits 7 and 8. The Court's reference to "medical records" having been presented at the sentencing trial indicates the strong possibility of such confusion, for the only records introduced at the sentencing trial were the involuntary commitment records, which are not likely to have been referred to as "medical" records. If indeed this mistake was made, the

The foregoing is an accurate and complete summary of all the evidence presented on behalf of Mr. Foster at his sentencing trial. Referring to the Court's description of this evidence, however,[8] it becomes clear that the Court misunderstood what was in evidence. Despite the Court's recitation to the contrary, as the foregoing summary shows, there was no evidence presented — testimonial or documentary — of "episodic psychosis and paranoid schizophrenia" or of "a lessened ability to perceive right from wrong."

The only evidence establishing these crucial facts is in documents which were not presented in Mr. Foster's sentencing trial. These documents are (a) three sets of medical records reflecting Mr. Foster's numerous psychiatric hospitalizations, from Bay County Memorial Hospital (Panama City), Florida State Hospital (Chattahoochee), and Bay County Guidance Clinic (Panama City); and (b) two pre-trial evaluations of Mr. Foster's competency and sanity, one of which was conducted by Dr. Mason. The first set of documents, the medical records, provide the only documentary proof of Mr. Foster's episodic psychosis and paranoid schizophrenia. However, these records were never presented to the judge or jury during the entire course of the proceedings against Mr. Foster. They were first produced in a judicial proceeding in the habeas corpus hearing in the district court, as Petitioner's Exhibits 7, 8, and 9. [These records were summarized in detail at Pet. Br. 30-32.] The second set of documents, the pre-trial psychiatric evaluations by Dr. Mason and Dr. Lathan Crandall, briefly refer to Mr.

Court's misreading of the record can be explained, for the medical records introduced in the district court proceeding do present the evidence which Mr. Mayo did not present at trial.

8 "Petitioner adduced substantial evidence of his long history of psychiatric illness, including episodic psychosis and paranoid schizophrenia, drug and alcohol abuse and dependence, self-multilation, and a lessened ability to perceive right from wrong." 707 F.2d at 1349 n. 12.

Foster's history of psychosis,[9] but more significantly, establish Dr. Mason's opinion that Mr. Foster's "ability to discriminate between right and wrong, or to adhere to the right" was probably "impaired" at the time of the homicide by an alcohol-induced psychosis. Unlike the medical records, these reports were presented to the trial judge nearly one month prior to Mr. Foster's trial, in connection with a competency inquiry which resulted in a finding of competency upon counsel's stipulation that no hearing was necessary. See Pet. Br. 9-10. However, these reports were not introduced into evidence at trial, nor was any request made to the trial judge to consider them prior to the imposition of sentence. [The reports were introduced in the district court hearing, as Petitioner's Exhibit 4.] Thus, the jury had no knowledge of these reports (or of their contents) and could not have considered them. And although the trial judge might have considered them in carrying out his sentencing function, counsel did not ask that he do so. Further, because the judge imposed the death sentence immediately after the jury's advisory verdict (T. 653-659), without the benefit of a pre-sentence investigation, Foster v. State, 369 So.2d 928, 931 (Fla. 1979), it is highly unlikely that he did so -- despite this Court's observation that he "should have." 707 F.2d at 1344.

Accordingly, Mr. Foster was sentenced to death in a proceeding where "mental mitigation" was his only defense against death, see the transcript of the habeas corpus hearing (hereafter "HT."), at 63, yet the only evidence conclusively demonstrating the existence of mental mitigation was not presented for consideration in that sentencing proceeding. As Mr. Foster has demonstrated, the Court did not understand this, for the Court mistakenly believed that this evidence -- of "episodic psychosis and schizophrenia" and of "a lessened ability to perceive

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[9] Dr. Mason noted that Mr. Foster "has had a number of hospitalizations on the mental health unit and has received various diagnosises [sic] including schizophrenia and character disorder. Both times he has been diagnosed as psychotic have followed bouts of alcohol abuse." Dr. Crandall noted that "at [the time of Mr. Foster's state hospital commitment, Mr. Foster was] thought to be psychotic."

right from wrong" -- had been presented, and that Mr. Foster was essentially arguing that the "manner" of presenting this evidence was ineffective.

Rehearing, therefore, must be granted, because a factually correct reading of the record in Mr. Foster's case requires that the writ be granted for ineffective assistance of counsel.[10] Without belaboring the analysis of this issue already presented in Mr. Foster's briefs, this result is compelled by the following:

First, as his only plausible defense against death, Mr. Foster was entitled to have a reasonably effective presentation of the "mental mitigation" defense at trial. Cf. Washington v. Strickland, 693 F.2d 1243, 1252-1253 (5th Cir. 1982) (Unit B), cert. granted, ___U.S.___, 103 S. Ct. 2451 (1983).

Second, by failing to present evidence of "episodic psychosis and schizophrenia" and of "a lessened ability to perceive right from wrong," counsel failed as a matter of fact to establish "mental mitigation" as defined in Fla. Stat. §§ 921.141 (6)(b),(f). Since counsel failed to present evidence that Mr. Foster suffered from episodic psychosis and schizophrenia, the evidence showed that Mr. Foster suffered from an illness that was manifested only by "drug and alcohol abuse and dependence" and "self-mutilation." See 707 F.2d at 1349 n. 12. While chemical dependence can be mitigating, depending on the severity of the dependence and its impact upon the defendant's mental state, psychoses unquestionably are mitigating. By definition, an actively psychotic person has his or her "capacity ... to appreciate the criminality of his conduct or to conform his conduct to the requirements of law ... substantially impaired." Fla. Stat. §921.141 (6)(f). Cf. Jones v. State, 332 So.2d 615, 619, 621-622 (Fla. 1976).

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[10] In the alternative, the Court should at the very least remand to the district court for clarification of the ambiguity in the record created by the absence of Defendant's Exhibits One and Two from the trial record. See pp. 4-6, supra. Because this ambiguity may have contributed to the Court's critical misreading of the trial record, if there is any lingering doubt concerning what was in evidence and what was not in evidence at Mr. Foster's sentencing trial, that doubt should be resolved by a remand for further evidentiary development before decision of the petition for rehearing.

Moreover, since counsel failed to present available expert opinion evidence of Mr. Foster's "lessened ability to perceive right from wrong" as a result of his probable psychotic state at the time of the homicide, the evidence showed only that "Mr. Foster has very poor control when intoxicated and ... [that] ...intoxication would [a]ffect his ability to maintain a thought or to maintain a plan or carry it through" (T. 617-618). Without the opinion evidence that Mr. Foster's psychosis reduced his ability to distinguish between right and wrong at the time of the homicide, the evidence simply did not address the impact of Mr. Foster's illness on his legal responsibility for his actions. The evidence provided no basis to assess Mr. Foster's responsibility for his actions any differently than one would assess the "ordinary" intoxicated person's responsibility for his actions under the influence of a self-induced mental state. Again, the psychotic person necessarily has — and Dr. Mason was of the opinion that Mr. Foster had — an impaired ability to differentiate right from wrong. These facts, however, which conclusively establish "mental mitigation" in Florida were not presented.

Third, while counsel's strategy choice of the "manner" in which to present mitigating evidence cannot be challenged as ineffective, counsel's choice not to present at all the evidence which was necessary to prove the only plausible defense in mitigation -- which was available to counsel and according to his testimony in the habeas corpus hearing, known to counsel -- is a distinctly different issue. If the record in Mr. Foster's case had included the evidence which the Court mistakenly believed it included, it is clear that Mr. Foster's claim of ineffective assistance should have been decided against him, as the Court did. 707 P.2d at 1344. The critical fact in the Court's analysis was its mistaken belief that "[t]he evidence Mayo in fact presented covered essentially the same subjects as that which petitioner would now have him present." Id. It was upon this premise that the Court held that "Mayo's choice to present mitigating evidence in the manner he did was a strategic decision," not subject to challenge. Id. However, if the record is read accurately, this critical factual

premise disappears: the evidence Mayo presented did not cover "essentially the same subjects as that which petitioner would have him present." The evidence Mayo presented not only be de-emphasized the "complicated medical proof" -- it left that proof out altogether. And in leaving out that proof. Mayo left out the evidence critically necessary to proof of mental mitigation.[11]

Fourth, when the record is read accurately, the application of relevant legal principles requires that the writ be granted. In the context of counsel's duty to investigate a psychiatric defense and of counsel's duty to utilize expert assistance in the preparation of a psychiatric defense, "[t]his Court has repeatedly stressed the 'particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel.'" United States v. Pessel, 531 F.2d 1275, 1279 (5th Cir. 1976), quoting, United States v. Edwards, 488 F.2d 1154, 1156 (5th Cir. 1974). While the issue pre-

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11 "Complicated" or not, some medical evidence simply must be presented, if it is available, to establish mental mitigation. There must be evidence of some underlying mental disturbance or illness and of the impact of that condition upon the defendant's responsibility for his actions, to establish mental mitigation. Mayo failed to present the available evidence of the only underlying mental disturbance suffered by Mr. Foster which did impact upon, and lessen, his degree of responsibility for his criminal behavior, as well as the expert testimony confirming this impact.

An analogy is helpful in understanding the significance of Mayo's failure to present such evidence. Assume, for example, that Mr. Foster's defense was instead alibi, and there were three potential witnesses: one who saw him at a bar some time prior to the homicide, one who saw him some time after the homicide, and one who saw him there at the time of the homicide. The witnesses who saw him at the bar before and after the homicide did not know whether he was in the bar during the time of the homicide. The times at which Mr. Foster was observed by the two witnesses were such that he could have left the bar and committed the homicide and returned, but the gap between observations was not so long as to make these witnesses' testimony immaterial. These two witnesses were white, were well-respected, and had resided in Bay County for years. The third witness was black, had met Mr. Foster in jail while he was awaiting disposition of burglary charges, and was a resident of Detroit. Under these circumstances, counsel could not have decided to present only the two white witnesses, for fear of inflaming the xenophobia and racial prejudice of an "unsophisticated Bay County jury," and still have provided effective assistance. The only evidence he had available to prove the alibi defense conclusively was the testimony of the black witness. While trial strategy may have dictated emphasizing the testimony of the two white witnesses and de-emphasizing the testimony of the black witness, trial strategy could not, under the Sixth and Fourteenth Amendments, have sanctioned a decision to present only the testimony of the two white witnesses. Similarly, Mr. Mayo could not effectively have represented Mr. Foster by omitting the crucial evidence discussed herein, but he did.

sented here arises in a different context -- after counsel has presumably conducted an adequate investigation[13] and utilized psychiatric assistance in the preparation of his client's case, yet failed to present the medical evidence and expert testimony necessary to the proof of his client's psychiatric defense -- the underlying principle is the same: whether a defense so critically reliant upon medical evidence and expert opinion can be effectively presented without presenting available medical evidence and expert opinion which is necessary to the proof of the defense. Although this Court has not before been faced with this question, cf. Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981) (Unit B), the answer to it — the defense cannot be effectively presented without the presentation of such evidence — is compelled by the question itself.

This is particularly so in Florida, where the Florida Supreme Court has repeatedly emphasized that psychiatric testimony and medical evidence is "highly relevant to [the jury's] evaluation of mitigating circumstances," Miller v. State, 332 So.2d 65, 67 (Fla. 1976), and has held counsel to be ineffective for the failure to present such evidence when it is available. The Florida Supreme Court has held that psychiatric testimony and medical evidence are so important to the evaluation of mental mitigation that the trial judge's denial of the opportunity to the defendant to present such evidence to the advisory jury --despite expressly reserving to the defendant the opportunity to present the evidence to him after the jury has rendered its advisory verdict but prior to his sentence determination — entitles the defendant to a de novo sentencing trial. Miller v. State, 332 So.2d at 67-68; Messer v. State, 330 So.2d 137, 142-143 (Fla. 1976). Cf., Perri v. State, ___So.2d___, 1983 F.L.W., S.C.O. 398 (Fla.

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13 "Presumably" is used, because Mr. Mayo's testimony in the district court as to whether he had investigated and thus knew the full extent of Mr. Foster's entire psychiatric history or only his history of involuntary commitments was vague and equivocal, see HT. 19-22, as well as contradictory [e.g., he testified both that he obtained a copy of the Florida State Hospital records and that he did not have a copy of the records but only talked with a psychiatrist at the hospital (HT. 21-22)].

September 29, 1983) (No. 57,142).[14] Moreover, the Florida Court has held that counsel was ineffective for his failure, in a judge-only sentencing trial, to "ma[ke] ... reference to the reports of the two court-appointed psychiatrists who suggested [the defendant] may have been in some kind of disturbed psychological state at the time of the murder" — when those reports were available for the judge's consideration (the reports having been filed between the sentencing hearing and the sentence imposition proceeding) yet were not considered because counsel "made no reference" to them. Holmes v. State, 429 So.2d 297, 300 (Fla. 1983)(emphasis supplied).[15]

Accordingly, an accurate reading of the record herein compels the granting of the writ. Rehearing should, therefore, be granted for purposes of reversing the denial of habeas corpus relief or, at the very least, for purposes of clarifying the record, see n. 9, supra, prior to the reconsideration of the merits of Mr. Foster's claim of penalty trial ineffective assistance of counsel.

II. THE COURT HAS MISTAKENLY APPLIED THE DOCTRINE OF WAINWRIGHT V. SYKES TO ITS ANALYSIS OF MR. FOSTER'S CLAIM THAT THE SENTENCING INSTRUCTION VIOLATED LOCKETT V. OHIO

In his appeal to this Court, Mr. Foster argued that the sentencing instructions at his trial had the effect of precluding the jury's consideration of nonstatutory mitigating circumstances, in violation of Lockett v. Ohio, 438 U.S. 586 (1978). Pet. Br. 41-53. The Court, however, ruled that Mr. Foster's procedural default in raising this issue in the state courts, coupled with his failure

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[14] Thus, even if the trial judge in Mr. Foster's case had sufficient medical and psychiatric evidence available through the pre-trial competency reports, but cf. pp. 7-8, supra, the non-presentation of this evidence to the jury is a sufficient predicate under Florida law to require the Court to reach the issue of ineffective assistance presented by Mr. Foster — the failure to present such evidence, if only to the jury.

[15] Thus, even if the pre-trial competency reports provided sufficient medical and psychiatric evidence to prove Mr. Foster's mental mitigating circumstances, but cf. pp. 7-8, supra, Mr. Mayo's failure to "make reference" to those reports and thus draw the reports to the judge's attention in connection with his sentencing deliberation process would, standing alone, amount to ineffective assistance under the teaching of Holmes.

to "adduce sufficient facts to overcome the [Wainwright v.] Sykes[, 433 U.S. 72 (1977)] prejudice prong," 707 F.2d at 1347, precluded relief on this claim.

Mr. Foster submits that the Court erred when it utilized the procedural default doctrine of Sykes — in any respect -- in its analysis of this issue. As Mr. Foster attempted to bring the Court's attention by a supplemental brief on May 20, 1983, the Sykes doctrine cannot properly be applied in the federal habeas corpus review of the merits of any capital sentencing issue in Florida, particularly of the Lockett-violative instructional issue raised herein. The reason for this, as presented in the supplemental brief, is the Florida Supreme Court's inconsistent and arbitrary application of its own procedural default rules to the review of these issues. The arbitrary, on-again-off-again application of Florida's procedural default rules to the review of capital sentencing issues has occurred frequently enough to deprive those rules of the status of an "independent and adequate state procedural ground" -- thereby removing procedural default as a bar to federal review of capital sentencing issues on the merits. See Barr v. City of Columbia, 378 U.S. 146 (1964).

The full argument in support of this proposition is set forth in the supplemental brief which Mr. Foster attempted to file, a copy of which is attached hereto as Appendix A. Because the Court refused to permit the filing of this brief as "untimely" (order of June 16, 1983), Mr. Foster requests that the argument now be considered and that rehearing be granted to consider the Lockett instructional issue on the merits.[16]

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16 In reconsidering this issue, the Court should also reconsider its determination that Mr. Foster, in any event, did not present "significant nonstatutory mitigating evidence." 707 F.2d at 1347. As Mr. Foster has argued in the bulk of this petition, the evidence of "mental mitigation" presented by Mr. Mayo very likely was not sufficient to establish the statutory circumstances concerned with mental mitigation. Nonetheless, he did adduce some evidence of Mr. Foster's having suffered from a mental disturbance, which at least should have been considered as a nonstatutory mitigating circumstance. Accordingly, the Court's finding that there was no "significant nonstatutory mitigating evidence" was in error.

CONCLUSION

For these reasons, the Court should rehear Mr. Foster's appeal and, if necessary, remand for clarification of the evidentiary record made in his sentencing trial.

Respectfully submitted,

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By: Richard H Burr, III

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, RICHARD H. BURR, III, hereby certify that the foregoing Petition for Rehearing (with Appendix) was served upon counsel for respondents, Gregory C. Smith, Assistant Attorney General, The Capitol, Suite 1502, Tallahassee, Florida 32301, by depositing a copy of same in the United States mail, first-class postage prepaid, this 16th day of November, 1983.

Richard H. Burr, III

Of Counsel.

August 22, 1975

The Honorable Mercer P. Spear
Fourteenth Judicial Circuit Court
Panama City, Florida

Re: Charles Kenneth Foster
Case No. 75-486

Dear Judge Spear:

In accordance with your order of August 15, 1975, received by me on August 18, I carried out a psychiatric evaluation of Charles Kenneth Foster on August 20.

This man gives his age as 28. He says he completed the 10th grade but did not do well in school because he was not interested. Since leaving school about 11 years ago he has worked sporadically on fishing boats. He has been arrested repeated according to his own statement and according to the jailors who say they know him well and that the charges against him have been usually drunkenness, assault and disturbing the peace. He can not remember how many times he has been in jail. He admits to becoming mean when he is drunk and to having had many black-outs. On one occasion early in 1971 he slashed his arms with a razor blade while in jail and was transferred to Florida State Hospital where he remained for nine months being treated, he says, with Thorazine and Mellaril. The use of these antipsychotic drugs suggests that he was at that time thought to be psychotic and he says he was improved at the time of his release but it seems possible that the improvement may have been due to enforced abstinence from alcohol. He has since reported occasionall to the Panama City Guidance Clinic where he has been given Valium, which is used for anxiety but is not an antipsychotic drug. He reports having had three seizures over the last 6 to 8 years but admits all of these followed alcohol withdrawal, hence a diagnosis of epilepsy is not indicated. On the day prior to his last arrest he says he went with a casual male acquaintance to the man's Winnebago camper and the man gave him $40.00 to buy liquor. They had picked up two girls. He then remembers the girls telling him he had killed the man; he remembers nothing of this and does no think he did so. He does not feel he should be in jail and made threats against the sheriff and any others who may be responsible.

At the time of my examination Charles Kenneth Foster complained of difficulty in getting to sleep and said he occasionally heard his name called when there was no one there. Auditory hallucinations are not rare in non-psychotic persons in confinement. There were no other symptoms suggestive of psychosis. His affect was notably appropriate. Delusional thinking was not elicited. He told his story clearly and logically with no evidence of looseness of associations. In my opinion this man is not insane at the present time.

It is well known that excessive consumption of alcohol may produce temporary psychosis (insanity) in certain individuals and it seems possible that Foster may have been suffering from this condition at the time of the alleged crime but I know of no way of determining whether or not this was the case.

I believe he is now competent to assist his attorney in his defense.

Respectfully submitted,

Lathan A. Crandall, Jr., M.D.

September 13, 1975

Honorable Mercer P. Spear
Circuit Judge
Fourteenth Judicial Circuit
Bay County Courthouse
Panama City, Florida 32401

CONCERNING: Charles Kenneth Foster
Case No. 75-486

Dear Judge Spear:

This letter is a report of my psychiatric evaluation of Mr. Charles Kenneth Foster to determine whether the defendant was insane at the time of the alleged commission of the offense charged against him, namely murder in the first degree and robbery; and whether the defendant at this time is competent and capable of assisting his counsel in the preparation of his defense and during trial. This examination was conducted in response to your Court Order dated August 15, 1975.

Mr. Charles Kenneth Foster is a 28 year old divorced white male who was seen at the Bay County jail on September 4, 1975. He was seen alone, with my interviewing him through the bars of his cell because of the jailer's concern for security. I asked him if he recognized me and knew my name which he quickly answered. He appeared to come freely to the interview and was relaxed throughout the interview. Our interview lasted approximately two hours. He spoke freely, spontaneous, rational, coherent and goal directed manner. His mood and affect appeared appropriate to the circumstances and situation. I explained to him the nature of the interview by reading aloud your Court Order. He stated that he understood that he need not talk with me if he so desired, that our conversation would be neither confidential or privileged, that a writtenteport would be sent to the Court, and that I might be called to testify for or against him at any trial. He stated that he understood and wished to talk with me. There were no signs or symptoms of any formal thought disorder process or other gross psychotic thinking or behavior. According to him which was confirmed by the jailer, he was presently on Dilantin 100 mg. three times a day because of his "history of seizures." This medication had been recently prescribed by Dr. John Cluxton, a psychiatrist at the Bay County Guidance Clinic. He has been off any anti psychotic medication for approximately a year or more.

Mr. Foster is a known patient of mine. I have been his psychiatrist on three admissions to the Mental Health Unit, namely from September 7 to

September 29, 1972, January 14 to January 20, 1973, and October 17 to November 19, 1974. I have also treated him in the Day Care Program At Memorial Hospital from November 19, 1974 to December 3, 1974. According to records, he has also been hospitalized on the Mental Health Unit by Dr. John F. Mason in 1968 and then for 9 days in February 1974 and 12 days in September 1974. A third psychiatrist, namely Dr. John F. Cluxton hospitalized him on the Mental Health Unit from October 3, to October 8, 1974. "A fourth local psychiatrist, namely Dr. Paul Bittick, Jr. has been involved with him foâlowed at the Bay County Guidance Clinic from February 24, 1972 to the present. In addition, the patient relates being hospitalized at Florida State Hospital for approximately nine months in 1970. Throughout all of his mental health unit hospitalizations, no documented partial or full seizure activity occurred. During some of these hospitalizations, he was on an anti-seizure medication, namely Dilantin but on others, he was not. My clinical impression with these hospitalizations has been that of EMOTIONA UNSTABLE PERSONALITY, CHRONIC, WITH PSYCHOPATHIC TRAITS MANIFESTED BY ANXIETY AND DESPONDENCY WHEN UNDER STRESS; ACUTE AND CHRONIC ALCOHOLISM; SUICIDAL DEPRESSION; AND DRUG DEPENDANCE OF A PSYCHOLOGICAL TYPE TO ALCOHOL AND OTHER AGENTS. On numerous occasions over the years, attempts have been made to provide treatment to Mr. Foster for his drug abuse and emotional problems without success. He has been placed on Antabuse- a medication which when taken regularly will allow a violent physical reaction to take place with the ingestion of only the smallest amount of alcohol in any form. Records seem to show that he has never stayed on Antabuse for any period of time and has always stopped this medication and began drinking again. He himself stated that he began using drugs in 1971, after getting out of Florida State Hospital. "Everyone was smoking marijuana; and I had never tried it and wanted to do so and did. I liked it. It made me feel good, happy, relaxed." He went on to relate that he has abused prescription and medications such as Artane, which would make him actively hallucinate. He found that this would combat his loneliness and allow him to talk with someone, though an imagined person. He relates abusing Valium to get relaxed and also to help him sleep at night. He also relates abusing Tuinal in order to help him sleep. He has injected the Tuinal on occasions. The only other medicatio he related to me that he injected was the stimulant in nose inhalers which he would break open and squeeze out the liquid. He also abused nose inhalers by sniffing intensely for long periods of time in order to get a "high which made me feel good." He estimates that he has taken LSD approximately 20 times over the years. He personally relates starting to drink alcohol heavily when he was about 18 years of age. He relates many drinking spells and the use of all types of alcohol. He states that he has had two episodes of delirium tremens (once in the Bay County Jail and once in the Cedar Grove Jail)

Historically, he relates being born in DeFuniak Springs, Florida and moving to Panama City at a very early age where he was raised. He attended Cedar Grove Elementary School, Everâtt Junior High School and went as far as the tenth grade. He relates being sassy, cursing and

disrespectful to teachers from the first grade on. His truancy and fighting started about the fourth grade and it was also at this time that he started running away from home. He relates wanting to fight all the time. "I picked fights with everyone for no reason." He relates that he has run away from home about 4-5 times during his childhood. He always ran away with someone else"for the hell of it." He says that he started carrying a knife to school when entering Everitt Junior High School "because everyone else did. I wasn't afraid. I only pulled it on one kid in the 7th grade." He denies ever carrying a switchblade knife. He further relates being sent off to Marianna Boys School when 14 years of age for running away from home and truancy and stayed about one year. He was sent back to Marianna at about16 or 17 years of age and stayed 9-10 months. He says that he openly asked the juvenile officer to send him back to Marianna the second time because "I was always babysitting and caring for the kids which I didn't like."

Mr. Foster relates being started on Dilantin in August 1965. He relates that he was in the Panama City Jail for public drunkenness. While working on the Chief's car as a trustee, he was bending over and began having "electric feelings in my head 4-5 times, began jerking all over and fell unconscious." The next thing he remembers is being found by a passerby on the sidewalk. He saw Dr. Fraser about a week later after getting out of jail and was told that he had "epilepsy" and was placed on Dilantin 100 mg. three times a day by mouth. He relates only three other seizure episodes thereafter. The next one occurred in September 1968 when he was out fishing on a boat. He was taking Dilantin at the time faithfully. THe next occasion was October 1971 when he was again jailed following a drinking spree at the Panama City Jail for approximately three weeks. For one week while in jail, he felt that he was going to have a seizure because of these electric feelings going through his head. He finally got out of jail and about a week later while lying in bed, he had a seizure. The last seizure activity he claims occurred on July 15, 1975 on the night of the alleged murder incident. He relates that he had been in the Bay County Jail for approximately 83 days for a B&E charge and was released on July 3. He began drinking heavily for 3-4 days and stopped around Thursday or Friday night. The killing occurred on Monday he said. He also claims that he continued on his Dilantin as prescribed during this period of time. He denies any other drug abuse prior to or on the day of the killing. On the 15th of July, he states going to Tot's Bar where he stayed approximately 2-3 hours. He says that he had between 5-10 cans of beer and 2-3 glasses of whiskey and water. He met this man who called himself Mr. Todd who said he was from Ohio. Mr. Todd asked Foster whether he would be able to get him some gals. He responded affirmatively; and they went down to the Bayshore Bar where Foster introduced him to two girls. They agreed on a price of $40 a piece. He estimates that they were in Bay Shore Bar approximately 15-30 minutes and left about 11 or 12 p.m. One of the girls drove the man's Winnebago to an isolated place in the woods. They had bought a six pack of beer at the Bayshore Bar which Foster relates beginning to drink on the way out. He had also started

having sex with his girlfriend, Anita Childers. Shortly afterarriving at this isolated spot, Mr. Foster relates developing these feelings of electricity going through his head which made him feel like he was going to have a seizure. He relates putting his pants on and the next thing he remembers is awakening and finding himself covered with blood and asking about the old man. Mr. Foster states that he gave his pocket knife to Anita Childers and that she placed it in her bra. He does not remember getting it back from her. The other girl was named Gayle Evans; and the girls related to Mr. Foster that he had jumped on the old man, had grabbed him by the testicles and had jabbed him in the neck with the knife. They said I also stabbed him again when he moaned. "Later on, they told me that the man's penis had been cut off; but I don't know anything about that." Mr. Foster feels that he apparently had a seizure and during this seizure that the girls killed the man. Upon awakening from this "seizure", he stated that he wiped his fingerprints off around the Winnebago and covered the man with some bushes. "We then drove back to Panama City Beach and went swimming to get the blood off and took a cab home."

It is my professional opinion that Mr. Charles Kenneth Foster is presently competent and capable of assisting his counself in preparation of his defense and during the trial. Mr. Foster vacilated between thoughts of feeling that he either killed the man during his "seizure" or that the girls did it while he was unconscious. In all my experiences with Mr. Foster, I have never seen him to be psychotic nor to have either a partial or full seizure. As a psychiatrist, I am not impressed with Mr. Foster's claim to seizures. At times they have happened, and he has been onhis antiseizure medications, and at times when he has not been. On all occasions as he relates to me, they have occurred within days to weeks following heavy drinking and/or other drug abuse. Their occurence within days following heavy drinking would be consistent with possible seizure activity with alcohol withdrawal. Their appearance weeks later, with their having a prolonged prior feeling of impending seizure, with his recollection on one occasion of jerking, and with their occurring under such confortable circumstances as lying in bed are not essentially consistent with typical seizure behavior. The type of seizure activity that Mr. Foster has described to mewould be representative of a "grand mal" seizure in which the individual loses complete control of their bodily functions, falls unconscious and begins jerking with soiling of his pants and biting of his tongue or the inside of his mouth. This is followed by profound confusion and amnesia for what happens during the seizure, which lasts only 1 to several minutes. Purposeful activity does not occur during a grand mal seizure. I do not feel that I can relate the activity as described by the girls of Mr. Foster's alleged attack on the murdered man as consistent with a grand mal seizure. Therefore, it is my professional opinion that Mr. Charles Kenneth Foster was sane at the time of the alleged commission of the offense charged against him.

Sincerely,

John B. Sapoznikoff, M.D.

John B. Sapoznikoff, M.D., P.A.

JOHN F. MASON, M.D.
P. O. Box 12218
Panama City, FL 32401

September 17, 1975

The Honorable Mercer Spear
Judge of the Circuit Court
14th Judicial Circuit
Bay County Court House
Panama City, Florida 32401

RE: State of Florida
vs
Charles Kenneth Foster
Case # 75 - 486

Dear Judge Spear:

I saw Charles Kenneth Foster for psychiatric evaluation on Saturday, September 6, 1975.

At the time of the examination Mr. Foster recognized me immediately. He was oriented to time, place and person. With certain exceptions, recent and remote memory are intact. Apperception is good. There is no evidence of thought disorder, delusional thinking or hallucinations. He is fully aware of the nature of the charges against him and of the consequences if he is convicted. At present there is no evidence to suggest that he is suffering from any mental disease. He is capable of assisting in his defense.

In reference, however, to his mental status at the time of the murder and robbery there is some question. Mr. Foster relates quite well that he met the victim at Tot's bar and after a short conversation joined him in his Motor Coach. After consumption of several beers each, they proceeded to the La Royale where they approached two young women for purchase of their services. He went on to relate how the women, the victim and he drove to an isolated spot where the victim was subsequently killed. He is quite clear on his description of events up to a certain point, at which time he "knew" he was going to have a seizure. His next awareness is that he awakens, finds himself covered with blood, and is told by the girls that he has killed the victim. He relates that he does not remember doing this, but goes on to relate, again in great detail, how the girls told him he performed the murder.

Later he speculates that he did have a seizure, and while he was unconscious, one of the girls must have killed the man, then blamed him (Foster). He is sure that the true murderer will be identified and he will be exonerated.

The above story is inconsistent in a number of ways. It is unlikely that Mr. Foster could have, in the course of a seizure, carried out such a purposive act as killing a man, then hiding the body. It is possible, however, that after the events occurred, a subsequent major seizure could leave him with anterograde amnesia covering these events.

927 GRACE AVENUE • PANAMA CITY, FLORIDA 32401 • TELEPHONE 785-0256

Mr. Foster does present a history of a major seizure disorder dating back at leese 8 years, and has been taking Dilenten, an anticonvulsant, to prevent these. He has not been observed having a seizure in any of his several hospitalizations here and I am unable to confirm or deny the presence of a seizure disorder.

Mr. Foster also has a long history of abuse of various drugs and alcohol. He has had a number of hospitalizations on the mental health unit and has received various diagnosises including schizophrenia and character disorder. Both times he has been diagnosed as psychotic have followed bouts of alcohol abuse.

At the time of the alleged offense, Mr. Foster freely admits he has been drinking, and it is highly probable that his ability to discriminate between right and wrong, or to adhere to the right is significantly impaired by alcohol. I can find no evidence, however, that he was or is insane.

Signed: J. F. Mason M.D.
J. F. Mason, M.D.

JFM/bb
cc Virgil Q. Mayo

927 GRACE AVENUE • PANAMA CITY, FLORIDA 32401 • TELEPHONE 785-0256

I-855

In the Court of the County Judge,
in and for Bay *County,*
State of Florida.

Charles Kenneth Foster, w/m

Inquisition of Incompetency
(PETITION BY MEMBER OF FAMILY OR NEXT OF KIN)

To Joseph I. Mathis, *County Judge in and for the County Aforesaid:*

Your petitioner respectfully represents unto your Honor that she *is the* mother *of* Charles Kenneth Foster, *who is* 23 *years of age, and whose address is* Maxwell's Trailer Pk., Parker, P.O. Box 10095, *Florida. The said* Charles Kenneth Foster *is believed to be incompetent within the intent and meaning of Chapter 394, Florida statutes, as amended by Chapter 23157, Laws of 1945 and as amended by Chapter 317, Laws of 1957, and the nature of h* is *disability is* mental disorder

The members of the family of the said Charles Kenneth Foster *with their addresses, are as follows:*

Members of Family	Relationship	Addresses
Mary Foster	mother	Maxwell's Trailer Pk., Box 10095, Parker, Fla.
Frances Foster	wife	address unknown

WHEREFORE, your petitioners pray that an examination be made as to the mental and physical condition, or both, of the said Charles Kenneth Foster, *as provided by law, and that an order be entered adjudging the said* Charles Kenneth Foster *to be incompetent, if* he *is so found.*

Mary Foster

STATE OF FLORIDA
COUNTY OF Bay

Mary Foster *being sworn by me, the undersigned officer, says on oath that the statements contained in the foregoing petition are true, to the best of h* er *knowledge and belief.*

JOSEPH I. MATHIS, COUNTY JUDGE
IN AND FOR BAY COUNTY, FLORIDA

Sworn to and subscribed before me this 10 *day of* November, *19* 70

Admitted as evidence as Dft #1 10-4 *19* 71

Bruce Colling, Clerk,
By

A CERTIFIED TRUE COPY
HAROLD BAZZEL, CLERK
OF THE CIRCUIT COURT,
By
Deputy Clerk

Insanity Docket #23-Page 101

11-10-70

IN THE COURT OF COUNTY JUDGE
BAY COUNTY, STATE OF FLORIDA

IN RE:
Charles Kenneth Foster, w/m
An Alleged Incompetent

AFFIDAVIT RE: DETENTION ORDER

STATE OF FLORIDA
COUNTY OF BAY

Mary Foster of Panama City, Florida,

being by me first duly sworn, says that in connection with the petition now before this Court seeking an examination into the alleged incompetency of the above named subject, deponent is of the firm belief that the public safety and/or the alleged incompetent requires the immediate issuance of an order by this Court directing the Sheriff of Bay County, Florida, forthwith to confine said alleged incompetent in some specified place pending further proceedings herein and/or the further order of this Court.

Deponent bases this request for an order of immediate detention of the alleged incompetent on the following facts: That deponent believes said alleged incompetent to be in such mental state that he will not respond to this Notice,

Mary Foster
(signature of deponent)

Sworn to and subscribed to before me on this
10th day of November, A.D. 1970

Joseph L. Mark
County Judge, Bay County, Florida

Mentality Docket # 23 - Page 102

INQUISITION OF INCOMPETENCY
(CHAPTER 394 FLORIDA STATUTES AS AMENDED)

11-12-70

STATE FORM XL-3 REV.

In the Court of the County Judge,

in and for Bay *County,*
State of Florida.

Charles Kenneth Foster, w/m

Inquisition of Incompetency

Order for Detention of Alleged Incompetent

***WHEREAS,** there has been filed in my court a petition alleging that* Charles Kenneth Foster *is believed to be incompetent, and notice has been given of the date of the hearing to be had on said petition, to wit: the* 20th *day of* November, 19 70, 10:00 AM, *and it appearing to the court from evidence adduced before me that it is for the best interest of the alleged* Charles Kenneth Foster, *incompetent, or others, that* ____ *he be detained for observation and examination.*

It is ordered and adjudged that the said Charles Kenneth Foster, *alleged incompetent, be placed in the protective custody of* M. J. Daffin, Sheriff *until further order of this court.*

DONE AND ORDERED at Panama City, *Florida*
this 10th day of November, 19 70

Jewel D. Mathis
County Judge

STATE FORM XL-8 REV.

In the Court of the County Judge,

_____ *County,*

State of Florida.

Inquisition of Incompetency

(Order for Detention of Alleged Incompetent)

RECEIVED THIS ORDER FOR DETENTION ON THE 10th DAY OF NOVEMBER, 1970 AND EXECUTED SAME IN BAY COUNTY, FLORIDA ON THE 10th DAY OF NOVEMBER, 1970 BY PLACING CHARLES KENNETH FOSTER INTO THE CUSTODY OF M. J. DAFFIN.

M. J. DAFFIN
SHERIFF OF BAY COUNTY
W. J. Barefield
W. J. BAREFIELD
DEPUTY SHERIFF

FILED
NOV 12 1970
JOSEPH I. MATHIS
COUNTY JUDGE BAY COUNTY, FLA.
BY: _____ CLERK

INQUISITION OF INCOMPETENCY
(CHAPTER 394 FLORIDA STATUTES AS AMENDED)

STATE FORM 31-4 REV.

In the Court of the County Judge,

in and for Bay County,

State of Florida

Charles Kenneth Foster, w/m
County Jail

Inquisition of Incompetency

Notice to Alleged Incompetent

TO Charles Kenneth Foster, the alleged incompetent, and _____ and _____, members of his family.

WHEREAS, a petition has been filed before me, under the provisions of Chapter 394, Florida Statutes, as amended by Chapter 23157, Laws of 1945 and as amended by Chapter 57-317 Laws alleging that you Charles Kenneth Foster are thought to be incompetent because of the following disabilities: mental disorder

and requesting that an inquiry be made by this court as to your mental or physical condition, or both.

This is, therefore, to notify you that on the 20th day of November, 19 70, at 10:00 A.M., at my office in the courthouse in Panama City, Florida, a hearing on such application will be had by and before me, and you Charles Kenneth Foster may be heard, either in person or by counsel.

Given under my hand and official seal at Panama City, Florida this 10th day of November, 19 70

Fred L. Mathis
County Judge

STATE FORM XL-4 REV.

In the Court of the County Judge,

_____County

State of Florida.

INQUISITION OF INCOMPETENCY

(NOTICE TO ALLEGED INCOMPETENT)

RECEIVED THIS NOTICE ON THE 10th DAY OF NOVEMBER, 1
AND EXECUTED SAME IN BAY COUNTY, FLORIDA ON THE 10t
OF NOVEMBER, 1970 BY DELIVERING A TRUE COPY TO CHAI
KENNETH FOSTER THE WITHIN NAMED:

M. J. DAFFIN
SHERIFF OF BAY COUNTY
W. J. Barefield
W. J. BAREFIELD
DEPUTY SHERIFF

FILED
NOV 12 1970
JOSEPH I. MATHIS
COUNTY JUDGE, BAY COUNTY, FLA.
BY _____ CLERK

7/a

INQUISITION OF INCOMPETENCY
(CHAPTER 394 FLORIDA STATUTES AS AMENDED)

HEARING DATE: NOV. 20, 1970
10:00 AM
CONFINED: COUNTY JAIL

STATE FORM 21-6 REV. 11-23-70

Mental Docket #23
Case 104

In the Court of the County Judge,
in and for Bay *County,*
State of Florida.

Charles Kenneth Foster, w/m
Bay County Jail

Inquisition of Incompetency

Order to Summon Committee

In the Name of the State of Florida to the Sheriff of said Bay *County*

WHEREAS, there has been filed before me on this day, a petition alleging that Charles Kenneth Foster *is incompetent, and that h*is *disabilities are:* mental disorder

You are, therefore, commanded forthwith to summon John F. Mason, *M. D.,* *and* John F. Cluxton, *M. D., and* W. J. Barefield *as a committee of examination.*

Within a reasonable time after service of this summons they are required to secure the presence of Charles Kenneth Foster, *the above alleged incompetent, and to make such examination of* him *as will enable them to ascertain thoroughly h*is *mental and physical condition at the time of the examination. If they consider* him *to be incompetent, they shall determine whether h*is *condition is acute or chronic; what the apparent cause is; what hallucinations, if any, he has; and what h*is *age and propensities are. They are further directed to ascertain whether the said* Charles Kenneth Foster, *is indigent or possesses sufficient available means for h*is *support; and in making such investigation they may give consideration to the possibilities of h*is *acquiring property in the future.*

Given under my hand and official seal in Panama City, *Florida,* this 10th day of November, 19 70

Jack L. Mathis
County Judge

STATE FORM XL-6 REV.

In the Court of the County Judge,

_____*County*

State of Florida.

FILED
NOV 23 1970
JOSEPH I. MATHIS
COUNTY JUDGE BAY COUNTY, FLA
BY _____ CLERK

Inquisition of Incompetency

(Order to Summon Committee)

RECEIVED THIS ORDER ON THE 10th DAY OF NOVEMBER, 1970 AND EXECUTED SAME IN BAY COUNTY, FLORIDA ON THE 10th DAY OF NOVEMBER, 1970 BY SUMMONSING THE WITHIN NAMED:

DR. JOHN F. CLUXTON, M.D.
DR. JOHN F. MASON, M.D.
W. J. BAREFIELD, DEPUTY SHERIFF

M. J. DAFFIN
SHERIFF OF BAY COUNTY
W. J. Barefield
W. J. BAREFIELD
DEPUTY SHERIFF

INQUISITION OF INCOMPETENCY
(CHAPTER 394 FLORIDA STATUTES AS AMENDED)

Minute Docket 23-Page 105

11-23-70

STATE FORM XL-7

In the Court of the County Judge,

in and for Bay *County,*

State of Florida.

Charles Kenneth Foster, w/m

Inquisition of Incompetency

Report of Committee Finding Incompetency

To the Judge of said Court:

Bay *County*

Your committee appointed to examine the alleged incompetency of Charles Kenneth Foster, *having made a thorough examination of the mental and physical condition of the said alleged incompetent, begs to submit the following report: 1. We determine that he is incompetent, the apparent cause being* Paranoid schizophrenia

2. The same is acute ; *chronic* ✓

3. The particular hallucinations are ;

his propensities are Delusions of thinking

4. His age is 23 *5. he does* require *mechanical restraint to prevent him from self-injury or violence to others. 6.* He *is* destitute *and is* eligible *to be committed as such.*

7. Said person or the estate of said person is not *sufficient to support and maintain said person in full or in part, if* he *is committed to the Director of Mental Health for assignment to such State Hospital as the Director may designate. 8. Said Person does* not *have relatives who are legally responsible for his support and maintenance and who are* able *to pay in full or in part for the treatment of said person in a Florida State Hospital; the names and addresses of said relatives are as follows:*

Address

Address

Respectfully submitted this 19 *day of* Nov. *19* 70

M.D.

M.D.

Committee

In the Court of the County Judge,
in and for Bay County,
State of Florida.

Charles Kenneth Foster, w/m

Inquisition of Incompetency

ORDER ADJUDGING INCOMPETENCY

This matter coming on this day to be heard from the report of the examining committee heretofore appointed by this court and from the evidence introduced at the hearing on the petition heretofore filed in this court, and it appearing to the satisfaction of this court that Charles Kenneth Foster *, the person now under investigation, is incompetent and that he is incompetent by reason of* paranoid reaction *;*

that the said incompetent is now a resident of Bay *county, and has been a resident of the state of Florida for a period of* life *years; that his incompetency is acute* yes *, chronic* yes *, the particular hallucinations being* 0 *;*

that his propensities are delusional thinking *;*

that his age is 23 *; that the said incompetent* Charles Kenneth Foster *does not require mechanical restraint to prevent him from self-injury or violence to others, and that he is indigent or destitute and is eligible to be committed as such;*

It is, therefore, ordered and adjudged that the said Charles Kenneth Foster *is incompetent within the meaning of the statutes in such cases made and provided.*

DONE AND ORDERED in Panama City, Florida,
this 25th day of November, 19 70

Jacob L. Mack
County Judge

In the Court of the County Judge,

in and for Bay County.

State of Florida.

Charles Kenneth Foster, w/m

Inquisition of Incompetency

ORDER FOR DELIVERY OF MENTALLY INCOMPETENT TO STATE HOSPITAL

In the Name of the State of Florida, to the Sheriff of said County:

WHEREAS, on the 10th day of November 19 70, this court upon petition presented thereto did issue an order directing the sheriff of said county to summon forthwith the committee heretofore appointed to inquire into the competency of one Charles Kenneth Foster, a resident of the county aforesaid, and

WHEREAS, said committee has made its report to this court to the effect that its members find the said Charles Kenneth Foster to be mentally incompetent by reason of paranoid reaction

and to require confinement or restraint to prevent self-injury or violence to others, and the court having taken other evidence on said petition and the said Charles Kenneth Foster has by this court been adjudged mentally incompetent within the meaning of the statute in such cases made and provided.

It further appearing from the evidence taken by the court that physical condition of the said incompetent Charles Kenneth Foster, is such that he can safely make the trip to a State Hospital under the Division of Mental Health without endangering his life or health.

You are therefore, commanded forthwith to deliver the said incompetent Charles Kenneth Foster to the Superintendent of such State Hospital as the Director of Mental Health may designate for care, maintenance and treatment, as provided by law, together with a transcript of all proceedings in this case.

DONE AND ORDERED in Panama City, Florida, this 25th day of November, 19 70.

County Judge

8-11-71

RUBIN O. ASKEW
GOVERNOR

I-855

STATE OF FLORIDA

Dupell Rober
XXXXXXXXXX

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

Milton J. Hirshberg, M. D.
Superintendent
J. B. O'CONNOR, M.D.
SUPERINTENDENT

DIVISION OF MENTAL HEALTH
FLORIDA STATE HOSPITAL
CHATTAHOOCHEE, FLORIDA 32324

TELEPHONE
(904) 663-4311

XXXXXXXXXXXX
XXXXXXXXXXXXXXXXX

August 6, 1971

Re: Mr. Charles Kenneth Foster A 67 728

Honorable Tullis D. Easterling
Sheriff, Bay County
Panama City, Florida

Dear Sheriff Easterling:

This is to advise that the above named patient was presented before our General Staff on August 5, 1971, and it was the opinion of the staff that he be granted a competency discharge.

In keeping with your request of December 29, 1970, that you be notified prior to his release from this hospital, this is to advise that Mr. Foster is now available for release from this hospital. He will be retained in the hospital, pending the arrival of a properly authorized agent from your department visiting the hospital for the purpose of returning him to Bay County.

Please come to the hospital at your earliest convenience between the hours of 9 a.m. and 4 p.m.

Yours very truly,

Octavio C. Pinell, M. D.
Clinical Director

RLC/vgg

cc: Honorable Larry A. Bodiford
County Judge
Bay County
Panama City, Florida

STATE OF FLORIDA

COUNTY OF BAY

I, BRUCE COLLINS, Clerk of the Circuit Court in and for Bay County, Florida, do hereby certify that the foregoing is a true and correct copy of the Insanity Proceedings in the matter of Charles Kenneth Foster, w/m

as the same appears on file and of record in my office.

I further certify that I am the custodian of all records of the Circuit Court of Bay County, Florida, including all insanity records, and the seal of said Court; that this attestation is in due form and by the proper officer, and that full faith and credit should and ought to be given all my official acts as such in all courts of record and elsewhere.

WITNESS my hand and the seal of said Court at Panama City, Bay County, Florida, this 2nd day of October, A. D. 19 75.

BRUCE COLLINS, CLERK OF CIRCUIT COURT

BY Frances D. Allen
Deputy Clerk

IN THE Circuit COURT
Bay COUNTY, FLORIDA
NO. 74-54 eP

IN RE: Kenneth Foster

FILED
1974 FEB 14 AM 10:07
BRUCE COLLINS
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

PETITION FOR INVOLUNTARY HOSPITALIZATION AND HOSPITALIZATION CERTIFICATE*

I, E. L. King, as Administrator of Northwest Fla Co Mental Health Unit 600 Noma Circle Facility and Address (Panama City), hereby recommend that Kenneth Foster, a patient previously examined and evaluated, be hospitalized in a treatment facility.

The said patient's designated representatives are:

	First Representative – Mother	Second Representative – ex-wife	Guardian
Name	Mary C. Foster	Frances Foster	
Address	40 N. Church Ave. Panama City, Fla.	Rt. 7 Box 121 Milton, Fla.	
Telephone	785-9385		

February 14, 1974. E. L. King Administrator

PHYSICIAN'S OPINION

I, John F. Mason, a physician authorized to practice in the State of Florida, having personally examined Charles Kenneth Foster on 2-13, 1974, within five (5) days of the signing hereof and find from such examination that (he) ~~(she)~~ is mentally ill, having been diagnosed as Suicidal Depression and because of (his) ~~(her)~~ illness is [likely to injure (himself) ~~(herself)~~ or others if allowed to remain at liberty] or [in need of care or treatment and lacks sufficient capacity to make a responsible application on (his) ~~(her)~~ own behalf]. As evidenced by: Overdose of medication, self mutilative behavior

2-14, 1974. J F Mason M.D. M.D.

PHYSICIAN'S OPINION

I, JOHN B. SAPOZNIKOFF, M.D., a physician authorized to practice in the State of Florida, having personally examined CHARLES KENNETH FOSTER on 2-14, 1974, within five (5) days of the signing hereof and find from such examination that (he) ~~(she)~~ is mentally ill, having been diagnosed as DEPRESSIVE REACTION and because of (his) ~~(her)~~ illness is [likely to injure (himself) ~~(herself)~~ or others if allowed to remain at liberty] or [in need of care or treatment and lacks sufficient capacity to make a responsible application on (his) ~~(her)~~ own behalf]. As evidenced by: NEAR-LETHAL SUICIDE ATTEMPT; DRUG ABUSE; SELF-MUTILATION; HOSTILE, COMBATIVE BEHAVIOR

2-14, 1974. John B. Sapoznikoff, M.D. M.D.

* The patient and his guardian or representatives shall receive copies of the Petition for Involuntary Hospitalization and Hospitalization Certificate.

cc: Patient
Guardian)
First Representative) When applicable
Second Representative)

A CERTIFIED TRUE COPY
HAROLD BAZZEL, CLERK
OF THE CIRCUIT COURT
BY Jan Smith
Deputy Clerk

(By authority of Chapter 394.467 (2), Florida Statutes)
(October, 1973)

Admitted as evidence as Depnt
Exhibit 2 12-4 1974
Bruce Collins, Clerk

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

DIVISION OF MENTAL HEALTH

Memorial Hosp. Bay Co. Mental Health Unit FACILITY

Panama City, FLORIDA

FILED 14 AM 10:07

TO: Circuit Court IN RE: Kenneth Foster

NOTIFICATION TO COURT OF PATIENT'S ACTION REGARDING HEARING ON INVOLUNTARY HOSPITALIZATION

YOU ARE HEREBY INFORMED that Kenneth Foster
Patient

at Memorial Hosp. Bay Co. Mental Health Unit 600 N Mac Arthur Facility and Address Panama City, Fla.

[(has requested voluntary admission, please disregard my petition for Involuntary Hospitalization) (has waived his hearing for involuntary hospitalization) (has not waived his hearing for involuntary hospitalization.)]

If hearing is waived, said Waiver of Hearing for Involuntary Hospitalization is attached.

If hearing is not waived, you are requested to set a time and place for a hearing pursuant to a Petition for Involuntary Hospitalization and Hospitalization Certificate filed in your Court on February 14, 1974.

I hereby verify that on February 14, 1974, the patient and (his guardian) (his representatives), Mrs. Mary C. Foster and Frances Foster, were served with a Petition for Involuntary Hospitalization and Hospitalization Certificate, Waiver of Hearing for Involuntary Hospitalization, Petition for a Hearing on Involuntary Hospitalization, and Application for an Attorney with Notice of Petition for Involuntary Hospitalization.

February 14, 1974 E. L. Bing
Administrator

(By authority of Chapter 393.467 (2), Florida Statutes)
(July, 1972)

DIVISION OF MENTAL HEALTH

Memorial Hosp. Mental Health Unit FACILITY

Panama City, FLORIDA

TO: Circuit Court IN RE: Kenneth Foster

1974 FEB 14 AM 10:07
BRUCE C. COLLINS
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

FILED

NOTICE OF PETITION FOR INVOLUNTARY HOSPITALIZATION*

YOU ARE HEREBY NOTIFIED that a petition for a hearing has been filed with the Circuit Court, Bay County, Florida on the question of whether Kenneth Foster should be ordered retained or confined for involuntary hospitalization.

A patient may apply for voluntary hospitalization.

A patient may waive hearing by executing and returning to the administrator the attached Waiver of Hearing. If said hearing is not waived within five (5) days from the date on the Petition for Involuntary Hospitalization and Hospitalization Certificate, the court shall be notified by the administretor to proceed with setting a time and place for a hearing.

A patient may be represented by counsel at the hearing and if financially unable to retain counsel, counsel will be appointed by the court upon return of the attached Application for Attorney fully executed by the patient, his guardian, or representative.

If the hearing is waived, the patient, his guardian or representative may apply at any time within six (6) months from the date of the Hospitalization Certificate for a hearing on the need for hospitalization by signing the attached Petition for Hearing and indicating the court of jurisdiction.

A Petition for Hearing may be filed with a court in the county in which the patient is hospitalized at the time the certificate was executed or in the county in which the patient is located on the date of filing. A list of courts and the judges' names for each county in the State is attached to enable the patient to direct his inquires and file his petition in the appropriate place.

February 14, 19 74 E. P. Gay
Administrator

CERTIFICATE OF MAILING

I hereby certify that I mailed the above and foregoing notice to the named parties by depositing the same in the United States Post Office on _____, 19____.

_____

*The patient and his guardian or representatives shall receive copies of the Petition for Involuntary Hospitalization and Hospitalization Certificate, Waiver of Hearing for Involuntary Hospitalization, Petition for a Hearing on Involuntary Hospitalization, and Application for an Attorney with Notice of Petition for Involuntary Hospitalization.

cc: Patient
Guardian)
First Representative) When applicable
Second Representative)

(By authority of Chapter 394.467(2), Florida Statutes)
(July, 1972)

WAIVER OF HEARING FOR INVOLUNTARY HOSPITALIZATION*

Pursuant to the authority of Chapter 394.467 (2), Florida Statutes, I, _____

_____, a patient

in _____

Facility and Address

being fully advised that I have a right to hearing on the question of whether I should be involuntarily hospitalized, that I may be represented by counsel at such hearing, that if I do not waive hearing, a hearing will be held regarding the information contained in the attached Petition for Involuntary Hospitalization and Hospitalization Certificate and that I may at any time within six (6) months of the date of the Hospitalization Certificate after waiving hearing petition for a hearing on the question of continued involuntary hospitalization.

I hereby waive my right for hearing with the understanding that the Petition for Involuntary Hospitalization and Hospitalization Certificate shall serve as authorization for my admission to a treatment facility for a period not to exceed six (6) months from the date of the Petition for Involuntary Hospitalization and Hospitalization Certificate.

Witness _____ Patient _____

_____, 19____ _____, 19____.

APPLICATION FOR ATTORNEY

I, _____, hereby petition the Court to appoint an attorney to represent me at a hearing on whether I should be confined for involuntary hospitalization.

I hereby verify that I do not have assets of any kind which would suffice for the payment of attorney fees for representation in hearing on the question of involuntary hospitalization.

_____

(Patient) (Guardian) (Representative)

Sworn to and subscribed before me, this _____ day of _____, 19____.

_____

Notary Public

*The patient and his guardian or representatives shall receive a Waiver of Hearing for Involuntary Hospitalization and Application for Attorney.

cc: Patient)
Guardian) When applicable
First Representative)
Second Representative)

(By authority of Chapter 394.467 (2), Florida Statutes)
(July, 1972)

FILED

IN THE Circuit COURT

Bay COUNTY, FLORIDA

NO. _____

FILED

1974 FEB 14 AM 10:07

BRUCE COLLINS
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

IN RE: Kenneth Foster

PETITION FOR HEARING ON INVOLUNTARY HOSPITALIZATION*

Hearing having been previously voluntarily waived and patient having been involuntarily hospitalized in a treatment facility, and it having been explained that a petition for hearing might after waiver be filed at any time within six (6) months from the date of the Petition for Involuntary Hospitalization and Hospitalization Certificate in the _____ Court, _____ County Courthouse, _____, Florida, I hereby apply for hearing on the question of continued involuntary hospitalization of the above named. My relationship to the patient is that of (self) (guardian) (representative).

_____, 19____. _____
(Patient) (Guardian) (Representative)

APPLICATION FOR ATTORNEY

I, Kenneth Foster, hereby petition the Court to appoint an attorney to represent me at a hearing on whether I should be confined for involuntary hospitalization.

I hereby verify that I do not have assets of any kind which would suffice for the payment of attorney fees for representation in hearing on the question of involuntary hospitalization.

Kenneth Foster
(Patient) (Guardian) (Representative)

Sworn to and subscribed before me, this 14th day of February, 19 74.

Faye C. Harris
Notary Public

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES NOV. 6, 1975
BONDED THROUGH MURDOCH - HUCKLEBERRY, INC.

*The patient and his guardian or representatives shall receive copies of Petition for Hearing and Application for Attorney.

cc: Patient
Guardian)
First Representative) When Applicable
Second Representative)

(By authority of Chapter 394.467 (2), Florida Statutes)
(July, 1972)

NO: 74-54-CP

IN RE: Kenneth Foster

1974 FEB 14 AM 10:28
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

ORDER APPOINTING COUNSEL

This matter being before the Court for consideration pursuant to Chapter 394–Part I, Florida Statutes, in which Kenneth Foster seeks the services of Court appointed counsel, and it being determined by the Court pursuant to affidavit filed herein that Kenneth Foster is unable to afford counsel, it is therefore,

ORDERED

1. Carroll L. McCauley, an attorney practicing in Panama City, Florida, is hereby appointed counsel to represent Kenneth Foster in all pending matters under Chapter 394–Part I, Florida Statutes.

2. The County of Bay will pay reasonable attorney's fees to be determined after a hearing thereon by the (~~Chairman~~ (judge) in Bay County, Florida.

ORDERED at Panama City, Florida this 14th day of February, 19 74.

Acting Circuit Judge

(By authority of Chapter 394–Part I, Florida Statutes)
(July, 1972)

NO. 74-54-CP

TO: Kenneth Foster
Mary E. Foster
Frances Foster
Mr. E. L. King, Adm., Memorial Hospital, Bay County
Dr. John F. Mason
Carroll L. McCauley, Esq.

IN RE: Kenneth Foster

1974 FEB 14 AM 10:28

NOTICE OF HEARING ON INVOLUNTARY HOSPITALIZATION

YOU ARE HEREBY NOTIFIED that a hearing will be held on February 21st 19 74, at 3:00 PM (a. m.) (p. m.) on the question of whether Kenneth Foster (HEARING IN MENTAL HEALTH UNIT)

should be ordered retained for involuntary hospitalization.

A patient may be represented by counsel at the hearing and if financially unable to retain counsel, counsel will be appointed by the Court upon return of this notice with the attached Application for Attorney fully executed by the patient, his guardian or representative.

ORDERED this 14th day of February, 19 74.

Acting Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed the above and foregoing notice to the named parties by depositing the same in the United States Post Office on the 14th day of February, 19 74.

/s/ Frances S. Allan, Deputy Clerk

APPLICATION FOR ATTORNEY*

I, _____, hereby petition the Court to appoint an attorney to represent me at a hearing on whether I should be ordered retained for involuntary hospitalization.

I do not have assets of any kind which would suffice for payment of attorney fees for representation in hearing on the question of involuntary hospitalization.

_____
(Patient) (Guardian) (Representative)

Sworn to and subscribed before me, this _____ day of _____, 19___.

_____
Notary Public

*The patient and his guardian or representatives and facility administrator shall receive Notice of Hearing and Application for Attorney.

cc: Patient
Facility Administrator)
Guardian) When Applicable
First Representative)
Second Representative)

(By authority of Chapter 394.467-(3), Florida Statutes)
(July, 1972)

Insanity Docket #25-Page 428

STATE OF FLORIDA

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

DIVISION OF MENTAL HEALTH

Memorial Hosp. Bay Co. FACILITY

Panama City, FLORIDA

IN RE: Kenneth Foster

74-54-CP

FILED

1974 FEB 21 AM 11:40

BRUCE COLLINS
CLERK CIRCUIT COURT
BAY COUNTY, FLORIDA

NOTICE OF DISCHARGE*

YOU ARE HEREBY NOTIFIED that Kenneth Foster admitted for (emergency admission) (Court ordered evaluation) (involuntary hospitalization) has this 21st day of February, 19 74, been discharged from this facility as no longer needing its services.

February 21, 19 74

E L King
Administrator

BAY COUNTY, FLORIDA
Filed for record 2-21-74
and duly recorded, Book and Page
indicated above. BRUCE COLLINS
CLERK CIRCUIT COURT
by [signature] D.C.

*The patient, his guardian or representatives, any physician executing a certificate admitting the patient to a receiving facility, and any court which ordered the patient evaluated or hospitalized shall receive Notice of Discharge.

cc: Patient
Guardian)
First Representative) When applicable
Second Representative)
Physician)
Court)

STATE OF FLORIDA

COUNTY OF BAY

I, BRUCE COLLINS, Clerk of the Circuit Court in and for Bay County, Florida, do hereby certify that the foregoing is a true and correct copy of the Incompetency Proceedings in the matter of Kenneth Foster

as the same appears on file and of record in my office.

I further certify that I am the custodian of all records of the Circuit Court of Bay County, Florida, including all incompetency records, and the seal of said Court; that this attestation is in due form and by the proper officer, and that full faith and credit should and ought to be given all my official acts as such in all courts of record and elsewhere.

WITNESS my hand and the seal of said Court at Panama City, Bay County, Florida, this 2nd day of October, A. D. 19 75.

BRUCE COLLINS, CLERK OF CIRCUIT COURT

BY Frances D. Dean
Deputy Clerk

ORIGINAL

No. 83-6583

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

==========

CHARLES KENNETH FOSTER,
Petitioner,

v.

CHARLES G. STRICKLAND, JR., et al.,
Respondents.

==========

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, CHARLES KENNETH FOSTER, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantialy the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

Richard H Burr, III

RICHARD H. BURR, III
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

No. 83-6583

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

==========

CHARLES KENNETH FOSTER,
Petitioner,

vs.

CHARLES G. STRICKLAND, JR., et al.,
Respondents.

==========

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, CHARLES KENNETH FOSTER, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [ ]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

_____

_____

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received._____

_____

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [ ]

b. Rent payments, interest or dividends? Yes [ ] No [ ]

c. Pensions, annuities or life insurance payments? Yes [ ] No [ ]

d. Gifts or inheritance? Yes [ ] No [ ]

e. Any other sources? Yes [ ] No [ ]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. _____

_____

3. Do you own cash, or do you have money in a checking or saving account? Yes [ ] No [ ] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. _____

_____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [ ]

If the answer is "yes" describe the property and state its approximate value. _____

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. _____

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

_____

Signature of Petitioner

STATE OF FLORIDA)

COUNTY OF BRADFORD)

CHARLES KENNETH FOSTER being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

_____
Signature of Petitioner

SUBSCRIBED and SWORN to before me this ___ day of _____, 1984.

_____
NOTARY PUBLIC

My Commission Expires:

RECEIVED
APR 16 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83-6583

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

==========

CHARLES KENNETH FOSTER,
Petitioner,

vs.

CHARLES G. STRICKLAND, JR., et al.,
Respondents.

==========

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, CHARLES KENNETH FOSTER, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [✓]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. I don't remember.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [✓]

b. Rent payments, interest or dividends? Yes [ ] No [✓]

c. Pensions, annuities or life insurance payments? Yes [ ] No [✓]

d. Gifts or inheritance? Yes [✓] No [ ]

e. Any other sources? Yes [ ] No [ ]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. My Mother sends me money for cigarettes when she can afford to.

3. Do you own cash, or do you have money in a checking or saving account? Yes [ ] No [✓] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. _____

_____

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [✓]

If the answer is "yes" describe the property and state its approximate value. _____

_____

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support. _____

_____

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct."

Charles Kenneth Foster

Signature of Petitioner

STATE OF FLORIDA)

COUNTY OF BRADFORD)

CHARLES KENNETH FOSTER being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Charles Kenneth Foster
Signature of Petitioner

SUBSCRIBED and SWORN to before me this 18 day of April, 1984.

J W Warren
NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

ORIGINAL

No. 83-6583

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RECEIVED
APR 23 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES KENNETH FOSTER,

Petitioner,

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JIM SMITH
Attorney General

GREGORY C. SMITH
Assistant Attorney

COUNSEL FOR RESPONDENTS

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

QUESTIONS PRESENTED

ISSUE I

WHETHER PETITIONER WAS AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL LEVEL.

ISSUE II

WHETHER THE CIRCUIT COURT OF APPEALS, ELEVENTH CIRCUIT, HAVING ISSUED AN OPINION WHICH DISPOSED OF AN ISSUE NOT RAISED BELOW, WAS UNABLE TO WITHDRAW A PORTION OF THAT OPINION *sua sponte*.

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OPINION BELOW

Petitioner's designation of the opinion below is correct and acceptable to respondent.

JURISDICTION

Petitioner's jurisdictional allegation is acceptable to respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on p. 2 in the petition for writ of certiorari.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case as found in the petition for writ of certiorari. However, respondent disagrees with the statement of facts to the extent that petitioner states that defense counsel had significant doubts as to the competence of Charles Kenneth Foster to proceed to trial. On pp. 56, 57 of the habeas corpus transcript in the District Court, defense counsel expressed his belief that according to the Florida test for competency, Mr. Foster was competent to stand trial.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Respondent does not disagree with petitioner's statement concerning how the federal questions were raised below.

REASONS FOR NOT GRANTING THE WRIT

ISSUE I

WHETHER PETITIONER WAS AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL LEVEL.

Petitioner urges this Court to review the decision of the Eleventh Circuit Court of Appeals on the allegation that Virgil Mayo, defense counsel, failed to produce evidence which, if presented, would have mandated the finding that a mitigating circumstance was proven.

We must approach this allegation on two levels. First, petitioner's claim fails if the disputed evidence cannot be shown to have required, as a matter of law, the finding of a mitigating circumstance. It is because this Court does not sit to review the sufficiency of evidence to establish a mitigating circumstance, that this is true. Eddings v. Oklahoma, 455 U.S. 104 (1982). Secondly, is counsel's failure to present this evidence ineffective assistance of trial counsel, or is it a tactical choice made by experienced counsel now examined by the finely ground lenses of hindsight?

However, it must initially be stated that petitioner here merely restates the argument made before the lower forum, and has failed in any way to establish that this case presents a substantial federal question which merits the exercise of this Court's jurisdiction. The allegation asks this Court to examine the evidence to determine whether the Circuit Court of Appeals correctly found that petitioner received effective assistance of counsel. Rule 17 of the rules of this Court, and Ross v. Moffitt, 417 U.S. 600, 616-617 (1974), makes it clear that such review is not the function of the writ of certiorari. See also: Stern and Gressman, Supreme Court Practice (5th Ed. 1978), pp. 254-317.

The evidence which petitioner alleges would certainly have proven a mitigating circumstance, was considered by the District Court and the appellate court, and both rejected petitioner's argument. It must be stated that petitioner had specifically instructed his attorney not to present a defense which might result in a commitment in a mental hospital. Foster v. Strickland, 517 F.Supp. 597, 602 (N.D.Fla. 1981). Additionally, Foster repeatedly stated his intention to "walk or burn." Id. at 602. Given these decisions, which three doctors had concluded Foster was competent to make, defense counsel had little choice. However, an examination of the District Court's remarks concerning this allegedly probative evidence is helpful.

> If Mayo introduced Foster's medical history and testimony of his relatives as Foster says he should have, a great deal of highly prejudicial evidence would have come along. The jury would have learned that Foster once took his mother's car from her at knifepoint; that he raped two women, one of whom was his sister-in-law; that he had been arrested a number of times for violent crimes; and that he once told his mother he was going to kill his little brother and cook him for supper.

Id. at 605. More importantly however, the District Court found that the decision not to present this evidence was a tactical one, within the discretion of counsel, and made with the intent to present the best chance of a jury recommendation of life.

> [Mayo] felt the psychiatric mitigating circumstances would be difficult for a unsophisticated Bay County jury to understand and likely to be ignored as technicalities by a jury outraged by the murder's brutality. Consequently he focused upon seeking mercy. To that end he put Foster's ex-wife on the stand. He felt she would evoke the jury's sympathy while presenting evidence from which he could also argue the psychiatric mitigating factors.
>
> * * *
>
> . . . Mayo's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and a good old fashioned appeal to mercy was reasonable.

Foster, 603, 605.

Petitioner's allegation that this disputed evidence unmistakably demonstrated a mitigating circumstance, is clearly without merit. However, the state will address the second prong of petitioner's claim: that the failure to present this evidence is ineffective assistance of counsel per se.

Petitioner has cited no case, nor could he, to support his claim that counsel may be found ineffective by the act of choosing to present one type of mitigating evidence over another. Petitioner has abandoned his earlier claim that counsel did not know about this evidence. However, an examination of one act or omission of counsel is not the appropriate focus of a claim of ineffective assistance of counsel. A claim that due process has not been afforded a petitioner because of his counsel's ineffectiveness must be examined by a totality of the circumstances. See Gideon v. Wainwright, 372 U.S. 335, at 339 (1963). It was on such an analysis, that the District Court and the appellate court below found that defense counsel's representation of petitioner was effective assistance of counsel. Petitioner has failed to present a federal question to this Court. Thus, this Court should decline to accept jurisdiction.

ISSUE II

WHETHER THE CIRCUIT COURT OF APPEALS, ELEVENTH CIRCUIT, HAVING ISSUED AN OPINION WHICH DISPOSED OF AN ISSUE NOT RAISED BELOW, WAS UNABLE TO WITHDRAW A PORTION OF THAT OPINION sua sponte.

Petitioner alleges that the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court. This allegation is grounded upon a claim that once the lower court issued its opinion addressing an issue not raised on appeal, it was "no longer free to undo this exercise of discretion at its whim." (Petition for Writ of Certiorari, at p. 34.)

Such a rule, if implemented, would make every opinion final upon its being issued. No individual may seriously contest the rule by which parties may request a rehearing, and upon such consideration a modification of the opinion may be had.

However, the issue was raised by a petition for rehearing, but was disposed of on the court's own motion. The petition for rehearing is provided herewith as respondent's appendix. In its petition for rehearing, respondents made it clear that under this court's decision in Barclay v. Florida, ____U.S.____(July 6, 1983), the opinion of the Eleventh Circuit could not stand. That the lower court withdrew the offending portion of the decision without reaching the question of conflict with Barclay, does not cause the withdrawal to be less appropriate. Clearly, if it were not withdrawn for the reasons stated, it would have been withdrawn for the reason that it conflicts with Barclay. The Eleventh Circuit reversed the sentence of death imposed by the State of Florida on the ground that a Florida procedural rule had been violated. The opinion held that because of the penalty involved; death, the state's procedural protection became cloaked with the status of a constitutionally protected right. In Barclay, while this Court found that a violation of state law had occurred, it nonetheless found that review of Barclay's death penalty was limited to whether the findings "are so unprincipled or arbitrary as to somehow violate the United States Constitution." The Eleventh Circuit's holding that the state's procedural protection became cloaked with the status of a constitutionally protected right, could not stand in light of Barclay.

Further, the Eleventh Circuit Court of Appeals held "[t]here is substantial evidence on the record that would have allowed the trial judge to impose a life sentence. . .." Eddings v. Oklahoma, 455 U.S. 104 (1982), specifically holds

that an analysis of the weight or sufficiency of the state's evidence is not appropriate. "We do not weigh the evidence for them." Id. at 117. Thus, there was a second reason why the Eleventh Circuit's opinion was erroneous.

In summary, it is quite clear that the Eleventh Circuit was totally within its discretion to withdraw that portion of the opinion which had not been raised on appeal. Petitioner has again failed to present this Court with a federal question. This Court should decline to accept jurisdiction.

CONCLUSION

For the above and foregoing reasons, respondent, Charles G. Strickland, Jr., respectfully requests this Honorable Court decline to accept certiorari jurisdiction.

Respectfully submitted:

JIM SMITH
Attorney General

By: _____
GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Mr. Richard H. Burr, III, 224 Datura Street -- 13th Floor, West Palm Beach, Florida 33401, Attorney of Record for Petitioner, and to Mr. Steven L. Seliger, 229 E. Washington Street, Quincy, Florida 32351, of Counsel for Petitioner, by U.S. Mail, this 20th day of April, 1984. I further certify that all parties required to be served have been served.

_____
GREGORY C. SMITH
Assistant Attorney General

ORIGINAL

No. 83-6583

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES KENNETH FOSTER,

Petitioner,

v.

CHARLES G. STRICKLAND, JR., Warden, Florida State Prison; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents.

A P P E N D I X

JIM SMITH
Attorney General

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR RESPONDENTS

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

Case No. 81-5734

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CHARLES KENNETH FOSTER,

Petitioner-Appellant,

-v-

CHARLES G. STRICKLAND, JR., Warden, Florida State Penitentiary; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; and JIM SMITH, Attorney General, State of Florida,

Respondents-Appellees.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JIM SMITH
Attorney General

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR RESPONDENTS-APPELLEES

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: Barclay v. Florida, ____U.S.____(July 6, 1983).

GREGORY C. SMITH
Assistant Attorney General

Attorney of Record for Appellees

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STATEMENT OF THE ISSUES

ISSUE I

WHETHER THE DECISION OF THIS COURT ANNOUNCES A RULE IN DIRECT CONFLICT WITH THE UNITED STATES SUPREME COURT'S RECENT DECISION IN BARCLAY V. FLORIDA, _____U.S._____(July 6, 1983).

ISSUE II

WHETHER THE DECISION OF THIS COURT ADDRESSES AN AREA OF PROCEDURAL STATE LAW, WHICH, UNDER BARCLAY, IS NOT APPROPRIATELY PRESENTED AS A GROUND FOR FEDERAL HABEAS CORPUS RELIEF.

ISSUE III

WHETHER THE DECISION OF THIS COURT ENTERS INTO THE REALM OF DETERMINING THE WEIGHT AND SUFFICIENCY OF EVIDENCE PRESENTED IN MITIGATION, WHICH IS INAPPROPRIATE UNDER Eddings v. Oklahoma, 455 U.S. 104 (1982).

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Appellant was found guilty of murder in the first degree and sentenced to death in Bay County, Florida. On direct appeal, the Florida Supreme Court affirmed the judgment and sentence. Foster v. State, 369 So.2d 928 (Fla. 1979). Petition for writ of certiorari was presented to the United States Supreme Court and was denied October 1, 1979.

After the Governor of Florida signed a death warrant requiring that appellant's sentence be carried out, appellant filed a motion for post-conviction relief in the trial court. The motion was denied May 15, 1981, and a direct appeal was taken to the Florida Supreme Court. On May 28, 1981, the Florida Supreme Court affirmed the trial court's ruling. Foster v. State, 400 So.2d 1 (Fla. 1981).

On May 26, 1981, a petition for habeas corpus relief was filed in the District Court of the Northern District of Florida. Appellant's execution was stayed pending an evidentiary hearing on the issue of effective assistance of counsel. An evidentiary hearing was held before the Honorable Lynn Higby, and on July 2, 1981, petitioner's prayer for relief was denied. Appeal to this court followed, and this court issued its opinion on July 27, 1983. This court reversed the sentence of death and remanded

the cause to the District Court so that the District Court could request the trial court enter findings of fact.

ARGUMENT

This court reversed the sentence of death on the ground that a Florida procedural rule had been violated. The opinion holds that because of the penalty involved; death, the state's procedural protection became cloaked with the status of a constitutionally protected right. By so deciding, this court has come into direct conflict with the United States Supreme Court's recent decision of Barclay v. Florida, _____U.S._____(July 6, 1983).

The procedural rule which this court determined was violated concerned the requirement of Florida law that the trial court make sufficient findings in imposing sentence of death. The Florida Supreme Court affirmed the judgment and sentence and stated:

> Although the findings of the trial judge in the case sub judice were not expansive, the justification of his sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment.

Foster, 369 So.2d, at 931, 932.

Specifically, the trial court's finding stated that

> [T]here are insufficient mitigating circumstances, . . . to outweigh the aggravating circumstances.

The majority opinion concluded that it is impossible to discern whether the trial court found no mitigating circumstances, or

whether he found mitigation which was insufficient to outweigh the aggravating circumstances.

In Barclay, petitioner asserted that the trial court's consideration of a nonstatutory aggravating circumstance, in violation of Florida law, mandated federal relief. While the Supreme Court found that a violation of state law had occurred, it nonetheless found that review of Barclay's death penalty was limited to whether the findings "are so unprincipled or arbitrary as to somehow violate the United States Constitution." The specific findings made by the trial court and affirmed on direct appeal by the Florida Supreme Court, were not subjected to a determination of whether they were supported by sufficient evidence, but rather the issue was whether the illegality so infected the balancing process that it was constitutionally impermissible for the Florida Supreme Court to let the sentence stand.

Barclay requires this court not enter into a determination of the sufficiency of the evidence. This court stated:

> [T]here is substantial evidence on the record that would have allowed the trial judge to impose a life sentence. . . .

To attempt an analysis of whether there was sufficient evidence presented to require the trial court to expressly mention the mitigating circumstance, is an analysis of the weight of the evidence which runs into direct conflict with Eddings v. Oklahoma, 455 U.S. 104 (1982).

In Eddings, the United States Supreme Court stated that the analysis of weight or sufficiency is a state court determination. "We do not weigh the evidence for them." Id. at 117. Both the trial court and the Florida Supreme Court found no mitigating circumstances to outweigh the aggravating circumstances. The fact that they mentioned that there were no mitigating circumstances to outweigh the aggravating circumstances gives rise to the presumption that mitigating circumstances were considered. In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court stated:

> In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter.

Id. at 1003.

However, whether the mitigating circumstances did not exist, or whether the trial court found that they were outweighed by the aggravating circumstances, is constitutionally irrelevant because under either alternative death was the appropriate penalty. Under this court's holding in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), the finding of no mitigating circumstances along with finding some aggravating circumstances allows the presumption that death is the appropriate penalty. Likewise, if as in Elledge, supra, mitigating circumstances are considered, but are found not to outweigh the aggravating circumstances, then the requirements of Lockett v. Ohio, 438 U.S. 586 (1978), are met and no error of constitutional dimension is presented.

Lastly, this court has addressed an issue never raised on appeal. The allegation that the trial court's order was insufficient under Florida law was mentioned in the petition for writ of habeas corpus, but appellant's appeal from the denial of that petition never addressed the issue of the propriety of the trial court's sentencing order. As a result, this court has reversed the death sentence imposed by a Florida court on an issue that was never presented on appeal before this court, and to which appellee has not had the opportunity to address until now.

The grounds upon which the opinion of this court decided the death sentence was inappropriate was abandoned by the failure to present that issue on appeal to this court.

CONCLUSION

This court is respectfully requested to rehear en banc the opinion filed in the above-styled cause for the reason that it conflicts with the holding of the United States Supreme Court in Barclay v. Florida. Further, the opinion of this court reversing the sentence of death addresses an issue which is purely a state procedural protection. As such, the court is "raising to a constitutional level an issue that is largely a matter of state law." (Dissent of Judge Roney.)

Further, by reversing the sentence of death, this court has delved into a determination of the sufficiency of the evidence

presented to the trial court in mitigation of sentence. Under Eddings v. Oklahoma, supra, that weighing process is reserved to the states.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc to Mr. Steven L. Seliger, 222 W. Pensacola Street, Tallahassee, Florida 32301, by U.S. Mail, this 14th day of July, 1983.

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GREGORY C. SMITH
Assistant Attorney General

of Counsel